

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation,

Supreme Court No. 153413

Plaintiff-Appellee,

Court of Appeals No. 324463

v

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK, an
Individual; ABRAHAM GEBREGERGIS,
an Individual; RAMAKRISHNAN
RAJAVENKITASUBRAMONY, an Individual;
CHRISTIAN ROSS, an Individual; KEVIN ROSS,
an Individual; TOMY SEBASTIAN, an Individual;
THEODORE G. SEEGER, an individual;
TROY STRIETER, an Individual; JEREMY J.
WARMBIER, an Individual; and SCOTT
WENDLING, an Individual; jointly and severally,

Defendants-Appellants,
and

CHRISTIAN ROSS, KEVIN ROSS, TOMY
SEBASTIAN, THEODORE G. SEGER, and TONY
DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, a
Delaware corporation, LAURENT BRESSON, and
FRANK LUBISCHER,

Counter/Third-Party Defendants.

/

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

	Page(s)
INDEX TO AUTHORITIES.....	i
STATEMENT OF QUESTIONS PRESENTED FOR SUPPLEMENTAL BRIEFING.....	vii
INTRODUCTION	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	3
A. Nexteer drafted and signed an agreement providing for arbitration to resolve all disputes, with the exception of preliminary judicial relief.	3
B. Nexteer commenced preliminary proceedings and advised the court and parties that it planned to re-notice a preliminary injunction hearing soon after.	5
C. Before the preliminary injunction hearing was scheduled, the Business Court held a conference call with the parties and issued a Case Management Order reflecting the parties' "preliminary" positions.	7
D. Following Nexteer's explanation of the importance of the NDA to all its claims, Mando moved to enforce its contractual rights under the NDA and compel arbitration.	11
E. Court of Appeals erroneously overturned the Business Court.....	14
ARGUMENT.....	16
I. A PARTY ASSERTING AN EXPRESS WAIVER OF A RIGHT TO ARBITRATE MUST DEMONSTRATE THAT IT WAS PREJUDICED BY THE ACTIONS OF THE PARTY ASSERTING THAT RIGHT	18
A. Both Michigan's waiver test and federal jurisprudence require prejudice.	18
B. The prejudice requirement serves the strong policy favoring arbitration.....	22
C. Requiring prejudice to find waiver serves the legislature's goals in adopting the Michigan Arbitration Act.	23
D. There is not, and should be not be, any exception to the prejudice requirement just because a party asserts that waiver was "express" rather than "implied."	24

E.	The Court of Appeals' attempt to create an exception to the prejudice requirement also conflicts with rules permitting amendment of pleadings.	29
II.	THE PRELIMINARY CASE MANAGEMENT ORDER DID NOT CONSTITUTE AN EXPRESS WAIVER OF MANDO'S RIGHT TO ARBITRATE	30
A.	The Preliminary Case Management Order contains no indication of waiver, and the Business Court specifically indicated that arbitration was <i>not</i> waived in it.	31
B.	Checking the box "Not Applicable" reflected that arbitration did not apply to injunction proceedings, both as a matter of contract and the Michigan Arbitration Act.....	32
C.	The Preliminary Case Management Order was not a stipulation of express waiver.	33
D.	A preliminary case management tool is not an express waiver.....	37
III.	NEXTEER DID NOT SHOW PREJUDICE	38
	CONCLUSION	42

INDEX TO AUTHORITIES

	Page(s)
Cases	
<i>Advest Inc v Wachtel</i> , 668 A2d 367 (Conn 1995).....	19
<i>Ben P Fyke & Sons, Inc v Gunter Co</i> , 390 Mich 649; 213 NW2d 97 (1973)	29
<i>Best v Park West Galleries, Inc</i> , unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos 305318 and 308085), pp 4-7	18, 39
<i>Boynton v Medallion Homes Ltd P'ship</i> , unpublished opinion per curiam of the Court of Appeals, issued April 24, 2003 (Docket No 235939), pp 2-3.....	40
<i>Britton v Co-op Banking Group</i> , 916 F2d 1405 (9th Cir 1990)	19
<i>Burns v Olde Discount Corp</i> , 212 Mich App 576; 538 NW2d 686 (1995)	18
<i>Byrnes v Castaldi</i> , 72 AD3d 718 (App Div 2010).....	19
<i>Cabinetree of Wisconsin, Inc v Kraftmaid Cabinetry, Inc</i> , 50 F3d 388 (7th Cir 1995)	20
<i>Capital Mortg Corp v Coopers & Lybrand</i> , 142 Mich App 531; 369 NW2d 922 (1985)	39
<i>Cargill Ferrous Int'l v Sea Phoenix MV</i> , 325 F3d 695 (5th Cir 2003)	19
<i>Cent Indem Co v Viacom Int'l, Inc</i> , No 02 CIV 2779(DC), 2003 WL 402792, at *6 (SDNY Feb 20, 2003)	21
<i>Central Fla Investments, Inc v Parkwest Assocs</i> , 40 P3d 599 (Utah 2002)	19
<i>City of Detroit v AW Kutsche & Co</i> , 309 Mich 700; 16 NW2d 128 (Mich 1944)	16
<i>County of Hawaii v Unidev, LLC</i> , 289 P3d 1014 (Haw Ct App. 2012)	19
<i>Creative Solutions Grp, Inc v Pentzer Corp</i> , 252 F3d 28 (1st Cir 2001).....	19, 39

<i>Dean Witter Reynolds, Inc v Roven</i> , 609 P2d 720 (NM 1980)	19
<i>Drexel Burnham Lambert, Inc v Mancino</i> , 951 F2d 348, No. 91-3213, 1991 WL 270809, at *3 (6th Cir 1991)	40
<i>EE Tripp Excavating Contractor, Inc v Jackson Co</i> , 60 Mich App 221; 230 NW2d 556 (1975)	16
<i>Ehleiter v Grapetree Shores, Inc</i> , 482 F3d 207 (3d Cir 2007)	19, 22
<i>Fisher v AG Becker Paribas Inc</i> , 791 F2d 691 (9th Cir 1986)	20
<i>Flint Auto Auction, Inc v William B Williams Sr Tr</i> , unpublished opinion per curiam of the Court of Appeals, issued November 22, 2011 (Docket No 299552), p 2	18
<i>Francis v Kayal</i> , unpublished opinion per curiam of the Court of Appeals, issued May 3, 2016 (Docket No 325576), pp 3-4	27, 28
<i>Fromm v Meemic Ins Co</i> , 264 Mich App 302; 690 NW2d 528 (2004)	27
<i>George S Hofmeister Family Trust v FGH Indus, LLC</i> , No 06-CV-13984-DT, 2007 WL 2984188, at *6-7 (ED Mich Oct. 12, 2007)	39, 40
<i>Gilmore v Shearson/American Express Inc</i> , 811 F2d 108 (2d Cir 1987)	21, 22, 28
<i>Good Samaritan Coffee Co v LaRue Distrib, Inc</i> , 275 Neb 674; 748 NW2d 367 (2008)	19
<i>Hill v Ricoh Am Corp</i> , 603 F3d 766 (10th Cir 2010)	20
<i>Hughes v Lund</i> , 603 NW2d 674 (Minn Ct App 1999)	19
<i>Hurley v Deutsche Bank Tr Co Americas</i> , 610 F3d 334 (6th Cir 2010)	19
<i>In re Bruce Terminix Co</i> , 988 SW2d 702 (Tex 1998)	19
<i>In re Charter Behavioral Health Sys, LLC</i> , 277 BR 54 (Bankr D Del 2002)	37, 38
<i>In re Noel R Shahan Irrevocable & Inter Vivos Tr</i> , 932 P2d 1345 (Ariz Ct App 1996)	19

<i>Ivax Corp v B Braun of Am, Inc,</i> 286 F3d 1309 (11th Cir 2002)	19
<i>Jackson State Bank v Homar,</i> 837 P2d 1081 (Wyo 1992).....	19
<i>Kauffman v The Chicago Corp,</i> 187 Mich App 284; 466 NW2d 726 (1991)	1, 16, 18, 20, 30
<i>Khan v Parsons Global Servs, Ltd,</i> 521 F3d 421 (DC Cir 2008).....	20
<i>Klapp v United Ins Grp Agency, Inc,</i> 468 Mich 459; 663 NW2d 447 (2003)	34
<i>Madison Dist Pub Sch v Myers,</i> 247 Mich App 583; 637 NW2d 526 (2001)	17, 18, 22, 39
<i>Marlyn Nutraceuticals, Inc v Improvita Health Prods, Inc,</i> No CV 08-1798-PHX-MHM, 2008 WL 5068935, at *3 (D Ariz Nov 25, 2008)	26
<i>Matter of Estate of Finlay,</i> 430 Mich 590; 424 NW2d 272 (1988)	34
<i>McLaughlin v CSX Transp, Inc,</i> No Civ A 3:06CV-154-H, 2008 WL 3850709, at *1 (WD Ky Aug 14, 2008)	21
<i>MicroStrategy, Inc v Lauricia,</i> 268 F3d 244 (4th Cir 2001)	23
<i>Miller Brewing Co v Fort Worth Distrib Co,</i> 781 F2d 494 (5th Cir 1986)	22
<i>Moses H Cone Mem'l Hosp v Mercury Constr Corp,</i> 460 US 1 (1983).....	1, 16, 30
<i>Moton v Oakwood Healthcare, Inc,</i> unpublished opinion per curiam of the Court of Appeals, issued May 18, 2001 (Docket No. 220823), p 1o 220823, slip op at 1 (Mich Ct App May 18, 2001)	37
<i>MSO, LLC v DeSimone,</i> 94 A3d 1189 (Conn 2014).....	21
<i>Mueller v Hopkins & Howard, PC,</i> 5 SW3d 182 (Mo Ct App 1999)	19
<i>Nino v Jewelry Exchange, Inc,</i> 609 F3d 191 (3d Cir 2010)	26
<i>Omega Const Co, Inc v Altman,</i> 147 Mich App 649; 382 NW2d 839 (1985)	16

<i>Patten Grading & Paving, Inc v Skanska USA Building, Inc,</i> 380 F3d 200 (4th Cir 2004)	19
<i>People v Dowdy,</i> 489 Mich 373; 802 NW2d 239 (2011)	34
<i>Phillips v State Farm Ins Co,</i> unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket Nos 328309 and 32974) pp 4-5	28
<i>Port Huron Educ Ass’n, MEA/NEA v Port Huron Area Sch Dist,</i> 452 Mich 309; 550 NW2d 228 (1996)	30
<i>Quality Prods and Concepts Co v Nagel Precisions, Inc,</i> 469 Mich 362; 666 NW2d 251 (2003)	25
<i>Rauscher Pierce Refsnes, Inc v Flatt,</i> 632 So2d 807 (La Ct App 1994).....	19
<i>Rembert v Ryan’s Fam Steak Houses, Inc,</i> 235 Mich App 118; 596 NW2d 208 (1999)	16
<i>Rich v Walsh,</i> 590 SE2d 506 (SC Ct App 2003).....	19
<i>Rossi Fine Jewelers, Inc v Gunderson,</i> 648 NW2d 812 (SD 2002).....	19
<i>Rota-McLarty v Santander Consumer USA, Inc,</i> 700 F3d 690 (4th Cir 2012).....	22
<i>Rush v Oppenheimer & Co,</i> 779 F2d 885 (2d Cir 1985)	19, 21, 22, 40
<i>Saint Agnes Med Ctr v PacifiCare of Cal,</i> 82 P3d 727 (Cal 2003)	19
<i>Salesin v State Farm Fire & Casualty Co,</i> 229 Mich App 346; 581 NW2d 781 (1998)	18
<i>Sands Appliance Servs, Inc v Wilson,</i> 463 Mich 231; 615 NW2d 241 (2000)	30
<i>SCA Seros, Inc v Gen Mill Supply Co,</i> 129 Mich App 224; 341 NW2d 480 (1983)	41
<i>Sentry Eng’g & Constr, Inc v Mariner’s Cay Dev Corp,</i> 338 SE2d 631 (SC 1985)	22
<i>Sofola v Aetna Health, Inc,</i> No 01-15-00387-CV, 2016 WL 67196, at *7 (Tex Ct App Jan 5, 2016)	21

<i>Stifel, Nicolaus & Co Inc v Freeman</i> , 924 F2d 157 (8th Cir 1991)	19
<i>Sturm v Schamens</i> , 392 SE2d 432 (NC Ct App 1990)	19
<i>Tallman v Eighth Jud Dist Ct</i> , 359 P3d 113 (Nev 2015)	19
<i>Thompson v Skipper Real Estate Co</i> , 729 So2d 287 (Ala 1999)	19
<i>Thyssen, Inc v Calypso Shipping Corp, SA</i> , 310 F3d 102 (2d Cir 2002)	22, 23
<i>Traver Lakes Cmty Maint Ass'n v Douglas Co</i> , 224 Mich App 335; 568 NW2d 847 (1997)	29
<i>United States v Hougham</i> , 364 US 310 (1960)	29
<i>US Fire Ins Co v Walsh</i> , No Civ A 96-CV-8409, 1997 WL 45041, at *1 (ED Pa Jan 30, 1997)	21
<i>Van Ness Townhouses v Mar Indus Corp</i> , 862 F2d 754 (9th Cir 1988)	20
<i>Wesley Ret Seros, Inc v Hansen Lind Meyer, Inc</i> , 594 NW2d 22 (Iowa 1999)	19
<i>Whitley v Chrysler Corp</i> , 373 Mich 469; 130 NW2d 26 (1964)	34, 35, 36
<i>Wilbur-Ellis Co v Hawkins</i> , 964 P2d 291 (Or Ct App 1998)	19
<i>Williams v Cigna Financial Advs, Inc</i> , 56 F3d 656 (5th Cir 1995)	39
Court Rules	
Fed R Civ P 12(b)	40
MCR 2.116(C)(8)	39
MCR 2.116(C)(10)	39
MCR 2.118	11
MCR 2.118(A)(2)	29
MCR 2.401(B)(2)	37
MCR 2.401(B)(2)(c)(iii)	37

MCR 2.401(B)(2)(d)	37
--------------------------	----

Statutes

Federal Arbitration Act	18
Michigan Arbitration Act.....	1, 16, 23, 24, 32, 33
Michigan Uniform Trade Secrets Act.....	9, 10
Revised Uniform Arbitration Act	23, 24
Uniform Arbitration Act	24

Miscellaneous

Black's Law Dictionary (10th ed. 2014).....	30, 31
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STATEMENT OF QUESTIONS PRESENTED FOR SUPPLEMENTAL BRIEFING

- 1) Does a party asserting an express waiver of a right to arbitrate have to demonstrate that it was prejudiced by the actions of the party asserting that right?**

Defendants-Appellants answer: "Yes."

Plaintiff-Appellee answers: "No."

The Business Court for the Circuit Court of Saginaw County answers: "Yes."

The Court of Appeals answers: "No."

- 2) Does the case management order in this case constitute an express waiver of the right of the defendant, Mando America Corporation, to arbitrate?**

Defendants-Appellants answer: "No."

Plaintiff-Appellee answers: "Yes."

The Business Court for the Circuit Court of Saginaw County answers: "No."

The Court of Appeals answers: "Yes."

INTRODUCTION

Michigan statutes and public policy strongly favor the enforceability of private arbitration agreements. Indeed, that policy militates so strongly in favor of arbitration that “any doubt about the arbitrability of an issue is to be resolved in favor of arbitration.” *Kauffman v The Chicago Corp.*, 187 Mich App 284, 290; 466 NW2d 726 (1991) (citing *Moses H Cone Mem’l Hosp v Mercury Constr Corp*, 460 US 1, 24-25 (1983)). For these reasons, the Michigan Court of Appeals and an overwhelming number of federal courts and courts in other states have held that a party claiming waiver of an arbitration clause must prove prejudice, whether the waiver is express or implied.

This prejudice requirement serves the policy favoring arbitration and the legislative purpose undergirding Michigan’s Arbitration Act. And application of the prejudice requirement equally, to both express and implied waiver, eliminates artificial distinctions and simplifies the waiver analysis. (For example, when a party to an arbitration clause files suit in a court of law, has it impliedly or expressly waived its right to arbitration? What if that party simply answers a complaint filed by the other party? Etc.) Moreover, adopting a rule that treats inconsistent conduct less harshly than oral or written inconsistency would be contrary to the goals of arbitration. Accordingly, this Court should reverse the Court of Appeals and hold that an arbitration waiver always requires proof of prejudice. And because Nexteer has never alleged (much less proven) prejudice in the context of the proceedings here, this Court should also direct the parties to resolve their dispute in arbitration.

Regardless of the Court's holding on the first question presented, Mando's agreement to a preliminary form case management order did not expressly waive its right to arbitration. Consistent with the early nature of the proceedings, the Business Court appropriately indicated on the preliminary case-management form that although an arbitration agreement existed, it was "not applicable." Most important, although the form also contained a box for the Business Court to indicate that arbitration was "waived," the Business Court never checked that box. At all relevant times, Mando preserved its right to arbitrate, and this Court should so hold. Either way, the Court of Appeals should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Nexteer drafted and signed an agreement providing for arbitration to resolve all disputes, with the exception of preliminary judicial relief.

In June 2012, Mando and Nexteer began considering the possibility of a limited joint venture. See First Amended Complaint ¶ 134 (**Exhibit G**)¹. Nexteer proposed text for a non-disclosure agreement to govern Mando's access to Nexteer employees and information in connection with the proposed business venture, which included an arbitration clause. Mando accepted Nexteer's proposed language, including the arbitration clause, and the parties signed the non-disclosure agreement (the "NDA"). See *id.* at ¶ 135; May 7, 2014 Affidavit of Ronald Harkrader ("Harkrader Aff.") ¶ 5-8 (**Exhibit P**).

Section 11(a) of the NDA contains a broad arbitration provision:

[A]ny dispute, controversy, or claim arising out of or in relation to this Nondisclosure Agreement, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the notice of Arbitration is submitted in accordance with these Rules: (i) The place of the arbitration is Geneva, Switzerland; (ii) The arbitral tribunal consists of three arbitrators; and (iii) The arbitration proceedings shall be conducted in English.

NDA § 11(a) (**Exhibit N**) (emphasis added). Section 11(b) of the NDA reiterates that arbitration is to be the "sole and exclusive procedure[s] for the resolution of disputes between [Nexteer and Mando] arising out of or relating to" the NDA. *Id.* § 11(b).

¹ Mando will use the same letters to reference exhibits as it used in its application for leave to appeal. All exhibits that have a letter reference can be found in that filing and will not be refilled.

The NDA contained an express carve-out to the arbitration clause. Specifically, the NDA provided that without detriment to arbitration, a party could seek “a preliminary injunction or other preliminary judicial relief from a court with competent jurisdiction,” to avoid irreparable harm. *Id.*

Mando and Nexteer discontinued exploration of the joint venture in August 2013. See First Amended Complaint ¶ 143 (**Exhibit G**). Pursuant to the terms of the NDA, it continued to govern disputes arising from or related to its subject matter. *Id.* ¶ 141; see also NDA § 7 (**Exhibit N**).

The Individual Defendants are automotive engineers formerly employed by Nexteer. While the Individual Defendants were employed by Nexteer, Nexteer never required them to execute any non-compete or other agreement limiting their ability to work in the automotive industry. See Complaint at ¶¶ 35, 37, 48 (alleging that the Individual Defendants should be precluded from employment with a competitor based on prior access to confidential information and restrictions on solicitation, but not citing any post-employment restrictions on work for competitors of Nexteer) (**Exhibit F**). In September 2013, following changes in Nexteer management, the Individual Defendants resigned from Nexteer and began working for Mando. See Counter/Third-Party Plaintiff’s Counterclaim and Third-Party Complaint against Nexteer Automotive and Third-Party Defendants ¶ 67 (**Exhibit H**).

Despite having failed to bargain with the Individual Defendants for any restraint on employment within the automotive industry or with competitors following their separation, Nexteer demanded a temporary restraining order and injunction preventing

the Individual Defendants from working for Mando. According to Nexteer, such relief was warranted based on confidentiality and non-solicitation provisions contained in an employment agreement entered into in 2009 between each of the Individual Defendants and Nexteer. See Complaint at ¶¶ 35, 37, 48 (**Exhibit F**); see also Employment Agreements (**Exhibit T**).

B. Nexteer commenced preliminary proceedings and advised the court and parties that it planned to re-notice a preliminary injunction hearing soon after.

On November 5, 2013, Nexteer filed its Complaint in Saginaw Circuit Court, requesting assignment to the specialized Business Court. At approximately 4:45 p.m. that same day, Nexteer approached the Business Court for an *ex parte* temporary restraining order. See Transcript of November 15, 2013 Hearing on Nexteer's Motion for Temporary Restraining Order and Expedited Discovery ("TRO Hearing") at 4 (**Exhibit Q**).

Nexteer asked the Business Court to grant relief including: (1) a preliminary injunction that would "permanently restrain[] all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's [steering] systems;" (2) a temporary restraining order that would prohibit the Individual Defendants from soliciting Nexteer's employees or working on Mando's electrically assisted power steering system for a year; and (3) other relief including monetary damages against the Defendants. See, e.g., Complaint at ¶¶ 35-39, 48 (**Exhibit F**). Nexteer attached the NDA to its Complaint, and underlined the provision authorizing a court to order provisional relief notwithstanding the arbitration

clause. See NDA § 11(b). Nexteer did not plead any cause of action for breach of the NDA.

The Business Court was unavailable to hear Nexteer's application for relief *ex parte*, but instructed Nexteer to email its pleadings to counsel for Mando. See TRO Hearing at 5 (**Exhibit Q**). The following week, on November 15, 2013, the Business Court held a hearing on Nexteer's application.

During the hearing, the Business Court advised Nexteer that it was prepared to hear evidence, including witness testimony, on Nexteer's motion for a preliminary injunction. Nexteer stated that it was not ready for an evidentiary hearing, but expected it could hold such a hearing within a week or 30 days. See *id.* at 25:2-7, 27:13-25. Nevertheless, Nexteer continued to demand immediate injunctive relief, either permanently or until an evidentiary hearing took place.

The Business Court declined to grant the relief Nexteer sought, stating that the court had doubts about whether a 2009 employment agreement on which Nexteer relied to argue that it was entitled to injunctive relief had been superseded by a later agreement executed in 2010. The later version did not contain the same confidentiality and solicitation language as the 2009 agreement. Nexteer maintained that the 2009 agreement survived. *Id.* at 10-14.

Though it denied Nexteer's application for a temporary restraining order, the Business Court authorized Nexteer to re-notice the preliminary injunction hearing that Nexteer had been unprepared to hold that day. *Id.* at 97 ("I want you to focus on what you'll need to prove for a preliminary injunction"); see also *id.* at 105. Nexteer advised

the Business Court and the parties that it planned to hold an evidentiary hearing on the injunction in the very near future. *Id.* at 95 (complaining that “too much time has passed” since commencement of the action, discussing expedited discovery for a preliminary injunction hearing, and stating Nexteer’s proposal to “just condense everything over 30 to 40 [more] days”).

C. Before the preliminary injunction hearing was scheduled, the Business Court held a conference call with the parties and issued a Case Management Order reflecting the parties’ “preliminary” positions.

At the close of the hearing on the TRO, the Business Court provided counsel for all parties with a pre-printed, standard form case management order. See *id.* at 105 (“I’m going to give you a template of an order and we’re going to have a conference by telephone sometime next week”). The Business Court advised the parties that its hope was to “resolve everything within [6] months,” a time frame that would be “particularly applicable when injunctive relief is granted.” *Id.* at 105-106. Shortly thereafter, the Business Court held a scheduling conference call and prepared a draft initial scheduling order.

The Business Court signed the initial scheduling order (the “Preliminary Case Management Order”) on November 25, 2013. This was just 10 days after Nexteer had advised Mando and the Business Court that it planned to pursue a preliminary injunction and hold a hearing within “30 or 40 days.” See **Exhibit O**. The Complaint had been filed just 17 days earlier.

Consistent with the nascent status of the injunction proceedings, the Preliminary Case Management Order indicates that it represents the parties’ “preliminary”

statements of their positions. The Preliminary Case Management Order reflects that Mando's answer and affirmative defenses were "not yet due" at the time of the case management conference, and noted, with respect to admissions and stipulations of fact and as to documents, that the parties had made "none." *Id.* at 1. The Preliminary Case Management Order also memorializes the Business Court's order that discovery should proceed only on the single narrow issue that had been the chief focus of the TRO Hearing and would be essential to resolve any further claim for injunctive relief; *i.e.*, the enforceability of the 2009 version of Nexteer's agreement with its employees (upon which Nexteer premised its claim for an injunction). *Id.* at 2.

The Preliminary Case Management Order contained pre-printed check boxes regarding arbitration. There was a box for the court to indicate that arbitration was "waived," but the Business Court did not check that box. *Id.* at 2. Nor did the Business Court check the box that indicated that there was no arbitration agreement governing the parties' dispute. Instead, the Business Court added its own new box, which it checked to indicate that an arbitration agreement existed, but it was "not applicable" as of the initial conference call. *Id.*

On December 6, 2013, Nexteer filed an Amended Complaint. See **Exhibit G**. On December 17, 2013, Mando and the Individual Defendants moved to dismiss the Amended Complaint on three principal grounds: (i) Nexteer's claim for tortious interference failed due to the lack of the required element of malice; (ii) the 2009 version of the employment agreements had been superseded by the later agreement, and, therefore, the Individual Defendants did not have any non-solicitation obligations; and

(iii) a number of Nexteer's individual equitable causes of action were preempted by the Michigan Uniform Trade Secrets Act. The next day, Mando filed an Answer to the Amended Complaint, in which Mando "reserve[d] the right to add additional affirmative defenses" in the future. Answer of Defendant Mando America Corporation to Plaintiff's First Amended Complaint (the "Answer") at 32 (**Exhibit I**). The Individual Defendants also filed an Answer.

At the January 24, 2014 hearing on Defendants' motion to dismiss, Nexteer stated that its entire case depended on the NDA, explaining that it was pleading that Mando and the Individual Defendants had concocted a "scheme" during the period when Mando and Nexteer had been actively exploring the possible joint venture:

Again they say that all we've alleged is that these employees worked for Nexteer and had accessed information and now they work for a competitor. We've alleged a lot more than that. *We've alleged the whole scheme where Mando and the individual defendants surreptitiously worked together while Mando was Nexteer's partner*, and the individual defendants were Nexteer's employees to create a competing operation and that spawns a lot of claims and that's duplicitous behavior.

Transcript of January 24, 2014 Hearing on Defendants' Motion to Dismiss ("MTD Hearing") at 46-47 (**Exhibit R**) (emphasis added). In supplemental briefing, Nexteer denied that it had failed to plead tortious interference, again pointing to allegations about a purported scheme between Mando and the Individual Defendants arising from the NDA. See Response to Supplemental Brief of Defendant Mando Regarding Motion for Summary Disposition filed February 17, 2014 ("Nexteer Supplemental Brief") at 3-4 (**Exhibit M**) (alleging that "Mando and the Individual Defendants misused [the NDA]

in a disloyal scheme,” whereby: (i) Mando entered the NDA and agreed not to use information and access under it other than to advance the joint venture; (ii) through the NDA, Mando obtained information about Nexteer technology and key employees; and (iii) Mando “used the joint-venture relationship” to recruit “Nexteer’s key employees” and “to encourage those key employees to violate their non-solicitation agreements with Nexteer”). Nexteer claimed that *all* of Mando’s allegedly actionable conduct arose out of or related in one way or another to the Nexteer-Mando joint venture governed by the NDA, and that misconduct by the Individual Defendants allegedly arose from Mando’s conspiracy with the Individual Defendants to breach the NDA.

On February 26, 2014, the Business Court issued an order denying Mando’s motion to dismiss Nexteer’s tortious interference claim. The Business Court accepted Nexteer’s argument that Nexteer’s allegations regarding “misuse” of the NDA salvaged that claim by supplying the required element of malice or wrongful conduct. The Business Court granted Mando’s motion in part, however, and condensed Nexteer’s nine causes of action down to five. The Business Court’s decision eliminated claims that were preempted, redundant of claims that survived, or, in one instance, did not state a viable claim under Michigan law.² Nexteer did not seek leave to appeal the February 26, 2014 order.

² The Business Court narrowed Nexteer’s nine causes of action to five by dismissing duplicative and poorly pleaded claims. Counts I and VI (breach of contract and violation of the Michigan Uniform Trade Secrets Act (“MUTSA”)) survived. Counts II, III, and IX (tortious interference with business relations and expectations and employment contract, and civil conspiracy) were dismissed, in part, only to the extent redundant of and preempted by Nexteer’s MUTSA claim. Counts IV, V, and VIII (breach of fiduciary duty and aiding and abetting same, and conversion) were dismissed. Count VII (unjust enrichment and quantum meruit) was dismissed as redundant given Nexteer’s breach of contract claim.

D. Following Nexteer's explanation of the importance of the NDA to all its claims, Mando moved to enforce its contractual rights under the NDA and compel arbitration.

On May 8, 2014, Mando filed its Motion to Amend Answer to First Amended Complaint and Compel Arbitration (the "Motion"). Mando explained that when it had served its original answer, the case had fallen within the carve-out for arbitration in the NDA. See Mando America Corporation's Brief in Support of Motion to Amend Answer to First Amended Complaint and Compel Arbitration ("Mando Brief on Motion") at 7 (**Exhibit J**). Thus, Mando wrote that the case had been in a "preliminary relief posture for which the NDA creates a limited exception," and that the answer was drafted at a time when the significance of the NDA was "still emerging." *Id.* at 8. Mando's Motion cited MCR 2.118's liberal standard for allowing amendments to pleadings, as well as case law holding that amendments should be granted in the absence of "bad faith or prejudice," which did not exist.

Nexteer opposed Mando's motion to amend, protesting vehemently that its claims did not "arise out of or in relation to" the NDA and thus could not be arbitrated. Nexteer, however, did *not* claim that it would be prejudiced if the Business Court enforced the parties' agreement to arbitrate. See generally, Nexteer Response to Motion to Compel (**Exhibit K**). Nexteer did not even mention the Preliminary Case Management Order. Nor did Nexteer argue that there had been an affirmative waiver of Mando's right to arbitration. *Id.*

On June 3, 2014, the Business Court held a lengthy hearing on Mando's Motion and carefully considered all the parties' positions. See June 3, 2014 Transcript of

Hearing on Motion to Compel Arbitration (“Arbitration Hearing”) (**Exhibit S**). During the hearing, which lasted nearly four hours, the Business Court offered Nexteer repeated opportunities to identify any prejudice that Nexteer would incur from arbitration. See, e.g., *id.* at 48. Nexteer was unable to do so.

During the hearing, the Business Court brought up the Preliminary Case Management Order *sua sponte*. Noting that the conference had not been transcribed and his recollection might not be perfect, he recalled that the parties’ telephonic discussion about arbitration prior to creation of the Preliminary Case Management Order was “more in passing” and that he had “some recollection of no substantive discussion, but at least a recognition that it was there.” *Id.* at 43-44. The Business Court stated on the record that it had intentionally not checked the “waiver” box after the telephonic conference, and it had made a conscious decision to indicate that arbitration was “not applicable.” *Id.* at 45, 122 (Business Court: “I realize[] [the ‘is not applicable’ box] is different than waiver and that’s why it wasn’t checked”).

At the close of the hearing on Mando’s motion to amend, the Business Court asked the parties to submit additional briefing on whether the Preliminary Case Management Order constituted a waiver of Mando’s rights and, again, on whether any prejudice would accrue to Nexteer should it be compelled to arbitrate. Nexteer did not supply any authority holding that a case management order could be enforced against a party as a waiver of arbitration rights. Nexteer also did not identify any credible prejudice. See generally Supplemental Brief of Plaintiff Nexteer Automotive As to Mando America’s Waiver of Arbitration (**Exhibit L**).

On July 10, 2014, the Business Court issued its decision enforcing the parties' agreement to arbitrate. See Opinion Re: Mando's Motion for Leave to File Amended Answer and to Compel Arbitration ("Arbitration Opinion") at 9 (holding that the NDA was an "integral part" of the dispute, and formed "necessary elements of Nexteer's misappropriation and tortious interference claims, without which they would have been subject to dismissal," such that the present dispute is "arising out of or in relation to" the NDA) (**Exhibit B**). The Business Court held that:

- (1) Nexteer's claims are arbitrable, (2) Mando should be granted leave to file its proposed amended answer,
- (3) Nexteer's claims should be referred to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (per the NDA, but to be conducted within the Eastern District of Michigan in accordance with the FAA),³ and (4) the present litigation of Nexteer's claims should be stayed.

Id. at 14.

On August 22, 2014, the Business Court entered the parties' stipulated order comporting with the Arbitration Opinion. See Arbitration Order (**Exhibit C**). Thereafter on September 3, 2014, upon the stipulation of the parties to the counterclaim, the Business Court stayed the counterclaims pending the outcome of the arbitration. See Stipulation to Stay Counter/Third Party Plaintiffs' Claims Pending Further Order from the Court ("Stay Order") at 3 (**Exhibit E**).

³ The ICC Rules permit hearings to take place in a location agreed to by mutual consent. See ICC Rules Art. 18 (**Exhibit U**). At the Arbitration Hearing, in response to questioning by the Business Court, Mando represented that it would "leave it up to Nexteer" with respect to the location of any arbitration hearing. Arbitration Hearing at 59 (**Exhibit S**). Nexteer responded to Mando's offer by affirming, "if it is arbitrated we would want it here in Michigan for sure." *Id.* at 61.

Nexteer moved the Business Court to reconsider the Arbitration Order. On October 14, 2014, the Court denied Nexteer's motion. See Reconsideration Order (**Exhibit D**).

E. Court of Appeals erroneously overturned the Business Court.

Rather than act to protect its alleged trade secrets by commencing arbitration, Nexteer filed an application for leave to appeal the Business Court's decision to the Michigan Court of Appeals. The Court of Appeals granted leave and on February 11, 2016, the Court of Appeals issued a four-page decision in which it held that the Business Court's Preliminary Case Management Order was a "stipulation" by Mando that expressly waived arbitration. The Court of Appeals further held that Michigan's longstanding three-part waiver test, which includes a prejudice requirement, applies only to implied waiver; *i.e.*, express waiver does not require prejudice. See Appellate Decision at 3-4 (**Exhibit A**). The Court of Appeals did not cite any authority involving arbitration, express waiver or prejudice in support of its holding. Instead, the Court of Appeals stated that it was relying on a case where the court had held that a party cannot waive by silence.

On March 23, 2016, Defendants-Appellants sought peremptory action or failing that leave to appeal the Court of Appeals' decision. On November 2, 2016, the Court asked the parties to file supplemental briefs addressing the following questions: "(1) whether a party asserting an express waiver of a right to arbitrate must demonstrate that it was prejudiced by the actions of the party asserting that right; and if not, (2) whether the case management order in this case constituted an express waiver of the

right of [Mando] to arbitrate.” November 2, 2016 Order (**Exhibit 1 attached hereto**)⁴. In addition, the Court ordered oral argument on whether to grant Defendants-Appellants’ Application or take other action. *Id.*

⁴ All numbered exhibits are attached to this supplemental brief. They include this order and all unpublished authorities, which are cited to illustrate courts’ treatment of waiver in various factual and procedural contexts.

ARGUMENT

Contracts for arbitration enjoy a favored status under Michigan law.

Where the parties, by a fair agreement, have adopted a speedy and inexpensive means by which to have their disagreements adjusted, we see no public policy reasons for the courts to stand in their way. *On the contrary we have a clear expression of public policy in the legislative enactments which provide for statutory arbitration.*

Rembert v Ryan's Fam Steak Houses, Inc, 235 Mich App 118, 128; 596 NW2d 208 (1999) (reversed in part on other grounds) (quoting *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 246-47; 230 NW2d 556 (1975)) (emphasis in original). Thus, more than 70 years ago, this Court announced that “[t]he general policy of this State is favorable to arbitration If parties desire arbitration, courts should encourage them.” *City of Detroit v AW Kutsche & Co*, 309 Mich 700; 16 NW2d 128, 129 (Mich 1944).

Michigan’s “Legislature has expressed a strong public policy favoring private voluntary arbitration, and our courts have historically enforced agreements to arbitrate disputes.” *Rembert*, 235 Mich at 127-28 (analyzing Michigan’s “pro-arbitration” legislative history, and noting the “Legislature’s strong endorsement of arbitration” in its enactment of the Michigan Arbitration Act); see also *Omega Const Co, Inc v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985) (“Michigan public policy favors arbitration in the resolution of disputes.”). Michigan’s public policy in favor of enforcing private agreements to arbitrate is so strong that “any doubt about the arbitrability of an issue is to be resolved in favor of arbitration.” *Kauffman v. The Chicago Corp.*, 187 Mich App 284, 290 (1991) (citing *Moses H Cone Mem’l Hosp v Mercury Constr*

Corp, 460 US 1, 24-25 (1983)). Based on these precepts, Michigan's courts have embraced a bright-line rule for waiver, which requires the party opposing arbitration to "demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and *prejudice* resulting from the inconsistent acts." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). The Court of Appeals, however, created a wholly unnecessary exception to this three-part waiver test.

Not only would the Court of Appeals' exception mire courts in subjective line-drawing exercises over whether alleged waiver is "implied" or "express," abandoning Michigan's bright-line rule would yield a perverse result. No matter how egregiously inconsistent with arbitration and wasteful of judicial resources a party's *conduct* might be, that party would not be deemed to have waived the right to arbitrate in the absence of prejudice – while a party that made *statements* inconsistent with arbitration but that otherwise did not act inconsistent with arbitration could be found to have forfeited its right to arbitrate from the first minute it was haled into court.

As discussed below, the Court of Appeals' decision was simply wrong. The checking of a box by the Business Court in the Preliminary Case Management Order stating that arbitration was "not applicable" in injunction proceedings did not constitute a waiver of Mando's right to arbitrate, let alone an express waiver of that right. And, in any event, because Nexteer was not prejudiced, Mando did not waive its right to arbitration.

**I. A PARTY ASSERTING AN EXPRESS WAIVER OF A RIGHT TO
ARBITRATE MUST DEMONSTRATE THAT IT WAS PREJUDICED BY THE
ACTIONS OF THE PARTY ASSERTING THAT RIGHT**

A. Both Michigan's waiver test and federal jurisprudence require prejudice.

Under Michigan law, "[w]aiver of a contractual right to arbitration is not favored." *Kauffman*, 187 Mich. App. at 291. The party asserting waiver "bears a heavy burden of proof."⁵ *Id.* at 292; see also *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998).

Michigan courts apply a three-part test in determining whether a party waived its right to arbitration. Specifically, a party asserting waiver as a defense "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and *prejudice* resulting from the inconsistent acts." *Madison*, 247 Mich App at 588 (emphasis added); see also *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995) (same); *Kauffman*, 187 Mich App at 292 (same). It is well recognized that waiver may be either express or implied, and the same three-part test applies to both types of waiver. See *Best v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos 305318 and 308085), pp 4-7 (**Exhibit 2 attached hereto**) (stating that waiver may be express or implied, and reciting three-part waiver test); *Flint Auto Auction, Inc v William B Williams*

⁵ Nexteer has argued that the arbitration clause is governed by the Federal Arbitration Act ("FAA"). Nexteer Response to Motion to Compel at 4; see also Arbitration Opinion at 6. The FAA would only be relevant, however, in the event of a conflict between state and federal law. Because every federal court considers prejudice at least as a factor in waiver analysis just as Michigan does, however, the FAA dictates the same outcome as Michigan law. See *infra* at 18-19. Only Nexteer is urging that prejudice be eliminated from waiver analysis for one type of waiver.

Sr Tr, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2011 (Docket No 299552), p 2 (**Exhibit 3 attached hereto**) (same).

Like Michigan courts, federal courts “will not lightly infer a party’s waiver of its right to arbitration.” *Hurley v Deutsche Bank Tr Co Americas*, 610 F3d 334, 338 (6th Cir 2010); see also *Creative Solutions Grp, Inc v Pentzer Corp*, 252 F3d 28, 32 (1st Cir 2001) (same). Accordingly, federal courts also consider prejudice in analyzing whether a party waived arbitration.⁶ See, e.g., *Hurley*, 610 F3d at 338; see also *Creative Solutions*, 252 F3d at 32 ; *Rush v Oppenheimer & Co*, 779 F2d 885, 887 (2d Cir 1985); *Ehleiter v Grapetree Shores, Inc*, 482 F3d 207, 223 (3d Cir 2007); *Patten Grading & Paving, Inc v Skanska USA Building, Inc*, 380 F3d 200, 206 (4th Cir 2004); *Cargill Ferrous Int’l v Sea Phoenix MV*, 325 F3d 695, 700 (5th Cir 2003); *Stifel, Nicolaus & Co Inc v Freeman*, 924 F2d 157, 158 (8th Cir 1991); *Britton v Co-op Banking Group*, 916 F2d 1405, 1412 (9th Cir 1990); *Ivax Corp v B Braun of Am, Inc*, 286 F3d 1309, 1315-16 (11th Cir 2002). Indeed, there is no federal circuit

⁶ Other states also require prejudice, just like Michigan and federal courts. See *Thompson v Skipper Real Estate Co*, 729 So2d 287, 290 (Ala 1999); *In re Noel R Shahan Irrevocable & Inter Vivos Tr*, 932 P2d 1345, 1349 (Ariz Ct App 1996); *Saint Agnes Med Ctr v PacifiCare of Cal*, 82 P3d 727, 738 (Cal 2003); *Advest Inc v Wachtel*, 668 A2d 367, 372 (Conn 1995); *Wesley Ret Servs, Inc v Hansen Lind Meyer, Inc*, 594 NW2d 22, 30 (Iowa 1999); *Rauscher Pierce Refsnes, Inc v Flatt*, 632 So2d 807, 810 (La Ct App 1994); *Hughes v Lund*, 603 NW2d 674, 676 (Minn Ct App 1999); *Mueller v Hopkins & Howard, PC*, 5 SW3d 182, 187 (Mo Ct App 1999); *Good Samaritan Coffee Co v LaRue Distrib, Inc*, 275 Neb 674; 748 NW2d 367 (2008); *Tallman v Eighth Jud Dist Ct*, 359 P3d 113, 123-24 (Nev 2015); *Dean Witter Reynolds, Inc v Roven*, 609 P2d 720, 722 (NM 1980); *Byrnes v Castaldi*, 72 AD3d 718, 720 (App Div 2010); *Sturm v Schamens*, 392 SE2d 432, 433 (NC Ct App 1990); *Wilbur-Ellis Co v Hawkins*, 964 P2d 291, 292 (Or Ct App 1998); *Rich v Walsh*, 590 SE2d 506, 509-10 (SC Ct App 2003); *Rossi Fine Jewelers, Inc v Gunderson*, 648 NW2d 812, 815 (SD 2002); *In re Bruce Terminix Co*, 988 SW2d 702, 704 (Tex 1998); *Central Fla Investments, Inc v Parkwest Assocs*, 40 P3d 599, 608 (Utah 2002); *Jackson State Bank v Homar*, 837 P2d 1081, 1088 (Wyo 1992); *County of Hawaii v Unidev, LLC*, 289 P3d 1014, 1039-40 (Haw Ct App. 2012).

that does not consider prejudice as a factor in assessing waiver, including the three outlier federal circuits that have said prejudice may not be required in every instance.⁷

Like courts of this State, other state and federal courts recognize that the prejudice requirement applies regardless of whether waiver is termed “express” or “implied.” For example, as the Ninth Circuit has held:

“A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Fisher v AG Becker Paribas Inc*, 791 F2d 691, 694 (9th Cir 1986). . . . The *Fisher* test applies to both express and implied waiver.

Van Ness Townhouses v Mar Indus Corp, 862 F2d 754, 758 (9th Cir 1988) (emphasis added). Significantly, Michigan’s three-part test was modeled on the test set forth in the *Fisher* decision cited above, which applies to “both express and implied waiver.” See *Kauffman*, 187 Mich App at 292 (citing *Fisher* for proposition that a party arguing there has been a waiver of the right to arbitration “must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and prejudice to the party opposing arbitration resulting from the inconsistent acts”).

⁷ The three federal circuits that do not require prejudice conflict with Michigan law, which clearly holds that prejudice is a requirement for waiver. Indeed, even Nexteer does not go so far as to contend that prejudice is *never* required. In practice, however, each of these circuits does consider prejudice as part of a multi-factor test. See *Hill v Ricoh Am Corp*, 603 F3d 766, 774-76 (10th Cir 2010) (“the final consideration in waiver analysis is prejudice to the party opposing arbitration”); *Khan v Parsons Global Servs, Ltd*, 521 F3d 421, 425 (DC Cir 2008) (although “a finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived,” “a court may consider prejudice to the objecting party as a relevant factor”); *Cabinetree of Wisconsin, Inc v Kraftmaid Cabinetry, Inc*, 50 F3d 388, 390-91 (7th Cir 1995) (“[P]rejudice to the other party, the party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration”).

Other courts also have made clear that prejudice is required, without need to try to distinguish between different types of waiver. See, e.g., *US Fire Ins Co v Walsh*, No Civ A 96-CV-8409, 1997 WL 45041, at *1 (ED Pa Jan 30, 1997) (**Exhibit 4 attached hereto**) (waiver may be both express or implied, but regardless of the type of waiver at issue, “unless one’s conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right”); *McLaughlin v CSX Transp, Inc*, No Civ A 3:06CV-154-H, 2008 WL 3850709, at *1 (WD Ky Aug 14, 2008) (**Exhibit 5 attached hereto**) (party may waive right to arbitration “either expressly or implicitly” but “[w]aiver will only be recognized . . . where the party opposing arbitration shows specific conduct completely inconsistent with an intent to arbitration *and some prejudice to itself* due to the subsequent demand of arbitration”) (emphasis added); *MSO, LLC v DeSimone*, 94 A3d 1189, 1195-98 (Conn 2014) (noting that “waiver does not have to be express” and may be implied, but for both types of waiver “a party opposing arbitration on the ground of waiver must demonstrate that it will be prejudiced by enforcement of the arbitration clause.”).⁸ Thus, prejudice is a component of waiver analysis regardless of the type of waiver alleged.

⁸ In *Gilmore v Shearson/American Express Inc*, 811 F2d 108, 112 (2d Cir 1987), overruled on other grounds, the Second Circuit created a limited exception to the prejudice requirement, for the unique circumstance where defendant *conceded* that its conduct in withdrawing a motion to compel arbitration had waived the right to arbitrate. The Second Circuit clarified that its prejudice requirement continued to apply with full force to situations where there is ambiguity about waiver. *Id.* (citing *Rush*, 779 F2d at 887). Tellingly, courts in the Second Circuit and elsewhere have limited *Gilmore* to its facts and the specific context of withdrawal of a motion to compel arbitration. For example, in *Cent Indem Co v Viacom Int’l, Inc*, No 02 CIV 2779(DC), 2003 WL 402792, at *6 (SDNY Feb 20, 2003) (**Exhibit 6 attached hereto**), the defendant provided a “certification to the state court” in related proceedings that “no arbitration was contemplated” and did not include arbitration in its answer as a defense. The court held that “[t]hese acts do not amount to express waiver.” See also *Sofola v Aetna Health, Inc*, No 01-15-00387-CV, 2016 WL 67196, at *7 (Tex Ct

B. The prejudice requirement serves the strong policy favoring arbitration.

Prejudice is not merely a component of waiver of arbitration. It is the most important consideration. See, e.g., *Rota-McLarty v Santander Consumer USA, Inc*, 700 F3d 690, 702 (4th Cir 2012) (“The dispositive determination is whether the opposing party has suffered actual prejudice.”); *Ehleiter v Grapetree Shores, Inc*, 482 F3d 207, 222 (3d Cir 2007) (stating that “prejudice is the touchstone for determining whether the right to arbitrate has been waived”) (internal quotation marks omitted); *Thyssen, Inc v Calypso Shipping Corp, SA*, 310 F3d 102, 105 (2d Cir 2002) (“The key to waiver analysis is prejudice.”); *Miller Brewing Co v Fort Worth Distrib Co*, 781 F2d 494, 497 (5th Cir 1986) (“[P]rejudice . . . is the essence of waiver.”); *Sentry Eng’g & Constr, Inc v Mariner’s Cay Dev Corp*, 338 SE2d 631, 634 (SC 1985) (“[I]t is not inconsistency, but the presence or absence of prejudice which is determinative.”).

The reason that prejudice is afforded such heavy weight in arbitration waiver analysis is the strong policy favoring arbitration. For example, in *Rush*, 779 F2d at 885, the Second Circuit explained that “[g]iven [the] dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participating in litigation may be found only when prejudice to the other party is demonstrated. Waiver is not to be lightly inferred, and mere delay in seeking a stay of the proceedings without some resultant prejudice to a party cannot carry the day.” See also *Madison*, 247 Mich App at 588 (“the party arguing there has been a waiver . . . bears a heavy burden of proof” and

App Jan 5, 2016) (**Exhibit 7 attached hereto**) (declining to extend *Gilmore* to situation where party disputed waiver).

therefore “must demonstrate . . . prejudice . . .”); *Thyssen*, 310 F3d at 104–05 (explaining that it is because of the federal policy favoring arbitration that waiver “is not to be lightly inferred,” and that the “key to waiver analysis is prejudice”); *MicroStrategy, Inc v Lauricia*, 268 F3d 244, 249 (4th Cir 2001) (explaining that “in light of the federal policy favoring arbitration,” the circumstances giving rise to waiver “are not to be lightly inferred”) (citation omitted). Thus, in the absence of prejudice, the important policy favoring arbitration should be respected and the parties’ agreement to arbitrate should be enforced.

C. Requiring prejudice to find waiver serves the legislature’s goals in adopting the Michigan Arbitration Act.

In 2012, the Michigan legislature adopted Senate Bill 903, the Michigan Revised Uniform Arbitration Act (the “Michigan Arbitration Act”). The Michigan Arbitration Act is modeled on the Revised Uniform Arbitration Act (“RUAA”), a uniform statute promulgated by the National Conference of Commissioners on Uniform State Laws.

Under the RUAA, just as with Michigan common law, waiver is disfavored.

Comment 5 to Section 6 of the RUAA provides as follows:

Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. However, because of the public policy favoring arbitration, a *court normally will only find a waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice. . . .* For instance, where a plaintiff brings an action against a defendant in court, engages in extensive discovery and then attempts to dismiss the lawsuit on the grounds of an arbitration clause, a defendant might challenge the dismissal on the grounds that the plaintiff has waived any right to use of the arbitration clause.

Revised Unif Arbitration Act, § 6 cmt. 5 (2000) (citations omitted) (emphasis added).⁹ In construing waiver of arbitration under the Michigan Arbitration Act, prejudice must be considered, “because of the public policy favoring arbitration.”

In adopting the Michigan Arbitration Act, Michigan legislators sought to harmonize Michigan arbitration law with federal and state approaches. See Uniform Arbitration Act, Bill Analysis, S.B. 901, 902 (S-1), & 903 (*available at* <http://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0901-A.pdf>) (noting need to update Michigan law in view of greater adoption and evolution of arbitration “on both the State and Federal levels,” and stating conclusion that “[t]he Uniform Arbitration Act . . . would ensure consistency and uniformity with Federal law and laws of other states”). Therefore, the comments to the RUAA support continued use of Michigan’s three-part waiver test not only on grounds of public policy, but for reasons of uniformity and consistency.

In sum, virtually every court requires prejudice as an essential element of waiver analysis, and the comments to the model statute itself reflect the importance of the prejudice requirement. Accordingly, adopting the Court of Appeals’ approach would make Michigan an outlier among other states and conflict with federal jurisprudence.

D. There is not, and should be not be, any exception to the prejudice requirement just because a party asserts that waiver was “express” rather than “implied.”

The Court of Appeals upended public policy and legislative intent when it held that Michigan courts should jettison the three-part waiver test in instances of so-called

⁹ Uniform Arbitration Act (Dec 3, 2000), http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf.

“express waiver.” The Court of Appeals crafted an exception to the prejudice requirement based on dictum from an opinion that did not involve express waiver, prejudice, or arbitration. From nothing more than a passing statement that “discussion of implied waivers is unnecessary if an express waiver exists,” the Court of Appeals divined some basis to eliminate prejudice from arbitration’s three-part waiver test. See Appellate Decision at 3 (quoting *Quality Prods and Concepts Co v Nagel Precisions, Inc*, 469 Mich 362; 666 NW2d 251 (2003)).¹⁰ Not only is the Court of Appeals’ exception to the prejudice requirement not grounded in any law, the distinction that the Court of Appeals sought to draw between express and implied waiver suffers from a myriad of flaws.

First, any difference between the two types of waiver is purely one of nomenclature, with no substantive legal significance. Assuming a waiver exists (which is not the case here), an express waiver has no greater or lesser legal effectiveness than a waiver that is implied. In analyzing whether a party has waived arbitration, there is no reason to treat an express waiver as somehow different in kind from conduct that is inconsistent with arbitrating. Inconsistency expressed by word is no different from inconsistency carried out by deed, and in fact the latter is more likely to waste party and court resources. For that reason, an express waiver – which did not occur in this case – should stand on the same footing as any other form of conduct inconsistent with an

¹⁰ The issue in *Quality Products* was whether defendant could have mutually modified its rights under the parties’ contract by remaining silent in the face of plaintiff’s manifestation of an intent not to honor its terms. *Id.* at 377-78. The court concluded that silence did not amount to a waiver of the contract’s terms. *Quality Products* does not address arbitration provisions. Nor does it address an express waiver and whether or not such a waiver requires prejudice.

intent to arbitrate. See, e.g., *Marlyn Nutraceuticals, Inc v Improvita Health Prods, Inc*, No CV 08-1798-PHX-MHM, 2008 WL 5068935, at *3 (D Ariz Nov 25, 2008) (**Exhibit 8 attached hereto**) (“Inconsistency [with right to arbitration] usually is found when one party engages in conduct preventing arbitration, proceeds at all times in disregard of arbitration, *expressly agrees to waive arbitration*, or unreasonably delays requesting arbitration.”) (emphasis added). This Court need not create an entirely new rule to address what is merely a different flavor of the same legal doctrine to which the existing rule already applies.

Second, treating implied waiver more favorably than express waiver would reward parties who cynically “test the waters” in a judicial forum so long as they keep silent, while penalizing parties that innocently misspeak at the very earliest stage of a case. Adopting a rule that treats inconsistent conduct less harshly than oral or written inconsistency would be contrary to the goals of arbitration. As the Third Circuit has observed,

This recognition that the right to arbitrate may be waived [when the party opposing arbitration has spent considerable time and money litigating a case] is consistent with the purpose behind arbitration itself; arbitration is meant to streamline the proceedings, lower costs, and conserve private and judicial resources, and it furthers none of those purposes when a party actively litigates a case for an extended period only to belatedly assert that the dispute should have been arbitrated, not litigated, in the first place.

Nino v Jewelry Exchange, Inc, 609 F3d 191, 209 (3d Cir 2010). A statement, standing alone, cannot waste judicial resources or harm the party opposing waiver. For that reason, it makes sense to examine prejudice as well as inconsistency. Given the strong policy

favoring arbitration, there is no reason to treat express waiver at an early stage of a case as more irrevocable than months of conduct, while ignoring the highly relevant consideration of how any alleged waiver may have impacted the proceedings.

Third, no reason exists to depart from a workable and long-standing rule and burden already busy trial courts with the obligation to classify waiver into sub-types. Courts should not have to waste time on the useless exercise of attempting to sift “express” waivers from those that are “implied.” Notably, Michigan has decisively rejected just such an approach in the context of dividing the resolution of issues between the court and an arbitrator, because it conflicts with the public policy favoring arbitration. See *Fromm v Meemic Ins Co*, 264 Mich App 302, 306; 690 NW2d 528 (2004) (“Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation”).

The difficulty courts would face in attempting to draw arbitrary lines between “express” and “implied” waiver – and to apply different standards depending on the outcome of such line drawing – is illustrated by two recent unpublished Court of Appeals decisions, both of which were decided within a few months after the instant case. In *Francis v Kayal*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2016 (Docket No 325576), pp 3-4 (**Exhibit 9 attached hereto**), plaintiff sued in court on claims for breach of fiduciary duty and other claims, and moved to compel arbitration only after defendant obtained a default judgment on its counterclaims. In evaluating whether a complaint for judicial relief waived arbitration, the Court of Appeals applied Michigan’s three-part waiver test, and held that the plaintiff had *not*

waived its right to arbitrate. The Court observed that “although the first two prongs – that plaintiffs knew of their right to arbitration and that they acted inconsistently with the right – may be satisfied, defendant cannot show that she was prejudiced.” *Id.*

Similarly, in *Phillips v State Farm Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket Nos 328309 and 32974) pp 4-5 (**Exhibit 10 attached hereto**), the Court of Appeals applied the three-part waiver test where a party engaged in such conduct as attending scheduling and settlement conferences without invoking arbitration, defended depositions, and waited 17 months before bringing its motion to dismiss based on the arbitration clause. Yet again, the Court of Appeals found no waiver.

Juxtaposing the facts of these cases and *Gilmore* with the facts of this case illustrates the arbitrariness of applying a harsher rule to so-called “express” waiver. Is commencing an action in court and filing a complaint stating claims for judicial relief, as in *Francis*, “implied” or “express” waiver? Is withdrawing a motion to compel arbitration (as in the Second Circuit *Gilmore* case) an “express waiver” as the Second Circuit concluded, or a form of conduct from which an intent to waive must be implied? Should the act of participating in a scheduling conference, as in *Phillips* and the instant case, be possibly either an express or implied waiver depending on whether the court prepares an order after the conference? Clearly, it would be far easier and more consistent for courts to simply apply the same three-part test to all these fact patterns.

Applying the same rule to all these scenarios, moreover, avoids a rule that is inequitable and rewards parties that seek to test the waters in court. A plaintiff that affirmatively chooses to test the waters and file suit in court should not find itself better off because it acted merely by “conduct” than a defendant that does nothing more than state that arbitration is not applicable during a scheduling conference held during injunction proceedings. A party that not only attends a scheduling conference, but litigates for 17 months and appears at depositions, should not be judged less harshly for purpose of waiver analysis than a party like Mando that takes no discovery at all.

E. The Court of Appeals’ attempt to create an exception to the prejudice requirement also conflicts with rules permitting amendment of pleadings.

Mando moved to amend its answer and compel arbitration when, according to the Business Court, the case still “ha[d] not wholly emerged from the pleading stage.” See Arbitration Order at 12. MCR 2.118(A)(2) provides that leave to amend a pleading “shall be freely given when justice so requires.” *Id.* The rule is ““designed to facilitate the amendment of pleadings *except where prejudice to the opposing party would result.*”” *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 97 (1973) (quoting *United States v Hougham*, 364 US 310, 316 (1960)) (emphasis added). “Amendment is generally a matter of right rather than grace, and ordinarily should be denied only for particularized reasons, such as *undue prejudice* to the opposing party, undue delay, bad faith or dilatory motive on the movant's part, or where the amendment would be futile.” *Traver Lakes Cnty Maint Ass'n v Douglas Co*, 224 Mich App 335, 343; 568 NW2d 847 (1997) (emphasis added). Indeed, this Court has held that a defendant could amend

its answer to assert certain affirmative defenses as late as during a trial. See *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-40; 615 NW2d 241 (2000). Nexteer had not shown any prejudice, see *infra* at 38-40, and thus the Business Court was entirely correct to grant Mando's amendment.

The rules governing amendment are wholly consistent with Michigan's three-part test for waiver of arbitration. Even fully considered, formal pleadings may be "freely" amended in the absence of prejudice. If the Court of Appeals' rule were to stand, however, the right to amend would no longer be "free," and could be cut off as early as the initial case conference, even if no injustice would result from arbitration. Such a result makes no sense, especially given the strong policy favoring arbitration, and should not stand.

II. THE PRELIMINARY CASE MANAGEMENT ORDER DID NOT CONSTITUTE AN EXPRESS WAIVER OF MANDO'S RIGHT TO ARBITRATE

The Court of Appeals wrongly held that the Preliminary Case Management Order constituted an express waiver. The Preliminary Case Management Order does not meet the standard for express waiver. In fact, the Preliminary Case Management Order actually shows that Mando did *not* consent to waive arbitration.

An express waiver is one that has been communicated "with directness and clarity." EXPRESS, Black's Law Dictionary (10th ed. 2014). A finding of waiver requires "clear and unmistakable evidence." *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228, 238 (1996). Indeed, "[a]ny doubt about the arbitrability of an issue is to be resolved in favor of arbitration." See *Kauffman*, 187 Mich

App at 290 (citing *Moses H Cone*, 460 US 1). The Court of Appeals erred when it found waiver based on the face of a document that is filled with ambiguity. By finding that the Preliminary Case Management Order was a waiver despite the overwhelming evidence to the contrary, the Court of Appeals resolved doubts against arbitration, instead of in favor of arbitration as the law requires. The Court of Appeals also ignored fundamental principles of contract interpretation.

A. The Preliminary Case Management Order contains no indication of waiver, and the Business Court specifically indicated that arbitration was *not* waived in it.

The Preliminary Case Management Order does not contain any statement that arbitration is waived, much less an unambiguous statement made “with directness and clarity.” EXPRESS, Black’s Law Dictionary (10th ed 2014). The Preliminary Case Management Order form prepared by the Business Court includes a checkbox for the parties to indicate that arbitration “is waived,” but that box *was not checked*. Although the Court of Appeals appears to have relied on the fact that the Business Court checked the box for “not applicable,” the Business Court itself had explained that “[the ‘is not applicable’ box] is different than waiver and that’s why it wasn’t checked.” Arbitration Hearing at 122 (**Exhibit S**). Thus, the Preliminary Case Management Order does not contain any unambiguous statement of intent to relinquish the right to arbitrate and cannot be labeled an “express” waiver.

B. Checking the box “Not Applicable” reflected that arbitration did not apply to injunction proceedings, both as a matter of contract and the Michigan Arbitration Act.

When the Preliminary Case Management Order was signed by the Business Court, the parties were engaged in injunction proceedings only, with Nexteer pursuing its claims through an expedited motion for a preliminary injunction. See TRO Hearing at 25:2-7, 27:13-25. Those proceedings were explicitly carved out from the NDA’s arbitration clause. See NDA § 11(b) (a party “may seek a preliminary injunction . . . from a court with competent jurisdiction”). Indeed, the Legislature specifically vested courts with power to hear this type of application when it enacted the Michigan Arbitration Act. See Michigan Arbitration Act § 8 (providing that before appointment of an arbitrator, a party may seek provisional relief in court). Thus, the Preliminary Case Management Order correctly stated that arbitration was “not applicable” to Nexteer’s TRO and injunction proceedings.

In fact, the version of the NDA that Nexteer attached to its Complaint demonstrates that Nexteer understood that its motion for such relief was not inconsistent with the parties’ agreement to arbitrate, because that portion of the arbitration provision authorizing pursuit of injunctive relief through the courts was specifically *underlined*. See NDA § 11(b).

Further evidence that the Preliminary Case Management Order was entered in the context of injunctive proceedings that were carved out of the NDA’s arbitration clause is the fact that the Business Court authorized discovery to proceed on just one, narrowly-defined issue. That issue had been a central focus of the injunction argument

a few days before – namely, whether the 2009 employment agreement between Nexteer and the Individual Defendants controlled as Nexteer claimed, or whether it had been superseded. Discovery was not authorized concerning the NDA, the parties’ alleged conduct relating to the NDA, or any issue otherwise.

For these reasons, the Court of Appeals’ decision that the Preliminary Case Management Order amounted to a permanent and final waiver of arbitration runs counter to the Business Court’s *own* understanding of the Preliminary Case Management Order as well as that of the parties.

Moreover, this Court should adopt a rule that harmonizes with the legislative policy enabling courts to grant provisional relief. The Michigan Arbitration Act specifically empowers courts to grant preliminary relief. See Michigan Arbitration Act § 8. In this case, Nexteer’s request for an injunction was not resolved in a single day, and the Business Court had to exercise its power to manage its docket and meet with the parties to discuss next steps. This is entirely typical. A rule that forces courts and parties to look unduly over their shoulders in early-stage proceedings for fear that any notation in a scheduling order may be deemed to be an “express waiver” of arbitration would conflict with the decision to give courts jurisdiction over preliminary relief, even where later proceedings must take place in arbitration.

C. The Preliminary Case Management Order was not a stipulation of express waiver.

The Court of Appeals also erred when it held that the Preliminary Case Management Order was a stipulation by Mando to waive arbitration. The Preliminary

Case Management Order itself expressly states that (1) the parties made no admissions or stipulations of fact during the teleconference and (2) the parties did not waive arbitration. See Preliminary Case Management Order at 2. Thus, the text of the Preliminary Case Management Order refutes any notion that it is a stipulation.¹¹

“[A] stipulation must be construed as a whole and the intention of the parties collected from the entire instrument, and not from detached or isolated portions.” *Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964). This comports with the black letter rule that “contracts must be construed so as to give effect to every word or phrase as far as practicable.” *Klapp v United Ins Grp Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003); accord *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011) (“Court must construe a statute in a manner that gives full effect to all its provisions”).

Despite characterizing the Preliminary Case Management Order as a “stipulation,” however, the Court of Appeals did *not* look at the entire instrument or strive to give effect to every provision of it. Instead, the Court of Appeals focused only on the check mark that the Business Court had placed in the box indicating that the arbitration agreement “is not applicable.” The Court of Appeals ignored the fact that the Business Court *did not* check “waived.” The Court of Appeals also ignored the box stating that an agreement to arbitrate “*this matter*” (*i.e.*, Nexteer’s claims) “exists.” Preliminary Case Management Order at 2 (emphasis added). If the Scheduling Order

¹¹ Insofar as the Appellate Decision could be read to suggest that Mando stipulated that Nexteer’s claims were not arbitrable as a matter of law under Section 11 of the NDA, parties cannot stipulate to issues of law, such as whether Nexteer’s Complaint was arbitrable or not. See *Matter of Estate of Finlay*, 430 Mich 590, 595; 424 NW2d 272 (1988) (finding that court could not be bound by the parties’ stipulation “that the former Probate Code applie[s],” when action began after the effective date of the Revised Probate Code).

were a stipulation between the parties that the NDA was “not applicable” to Nexteer’s claims, why would it say that the NDA was an agreement to arbitrate those same claims? The parties could have, and would have, simply checked the pre-printed box to indicate that an agreement to arbitrate “*this matter*” “does *not* exist.” *Id.* Preliminary Case Management Order (emphasis added).

In addition to ignoring the text of the Preliminary Case Management Order Scheduling Order, the Court of Appeals also violated the rule that “a [stipulation] is to be read and construed in the light of the surrounding circumstances and the whole record.” *Whitley*, 373 Mich at 474. The Court of Appeals placed no weight on the “surrounding circumstances,” including that: (1) the NDA specifically carved out preliminary injunction proceedings; and (2) as of the date of the case-management conference, Nexteer was pursuing its claims through an expedited motion for preliminary injunction.

Nor did the Court of Appeals consider the preliminary nature of the Preliminary Case Management Order. Unlike in the typical case, Nexteer’s demand for injunctive relief dictated that the case management conference take place on an expedited basis before Mando had answered the Complaint or the time to do so had run. See Preliminary Case Management Order at 1. The Preliminary Case Management Order states that Mando’s affirmative defenses – arbitration among them – were “not yet due.” *Id.* Given the early stage of this action in November 2013, no party could have expected that Nexteer’s claims would suddenly proceed beyond injunctive proceedings without a corresponding modification of the Preliminary Case Management Order. In

the words of the Business Court, the Preliminary Case Management Order was “not necessarily [set] in stone” and “as things progress things c[ould] change.” Arbitration Hearing at 71.

Nexteer itself clearly did not view the Preliminary Case Management Order as binding and not subject to change. For example, though the Business Court checked the box on the Preliminary Case Management Order reflecting that “an agreement to arbitrate this controversy exists” *after* speaking with the parties, Nexteer has continued to take the opposite position, denying that the claims in “this controversy” are arbitrable. See, e.g., Opp. to Motion for Leave to Appeal at 2 (arguing that “Nexteer’s claims are not within the scope of the NDA’s arbitration provision”). Indeed, Nexteer placed so little weight on the Preliminary Case Management Order that it did not even mention it in opposition to Mando’s motion to compel arbitration, seizing upon the Preliminary Case Management Order as a basis to claim waiver only after the Business Court mentioned it.

In sum, in light of the totality of the circumstances, the only reasonable interpretation of the Preliminary Case Management Order is that there is an arbitration provision, but, given the procedural posture of the case – Nexteer’s pending application for a preliminary injunction – it is not applicable. Any other reading of the Preliminary Case Management Order fails to construe it “in light of the surrounding circumstances and the whole record.” *Whitley*, 373 Mich. at 474.

D. A preliminary case management tool is not an express waiver.

The Court of Appeals' decision affords far more weight to preliminary case management orders than Michigan's rules intend. Michigan rules and precedent reflect an understanding that case management orders are not static. The rules do not anticipate that scheduling orders are a vehicle for final waiver of favored rights like the right to arbitrate.

For example, unlike judicial orders that are treated as final and binding, the Michigan Court Rules specifically contemplate that "[m]ore than one [scheduling] order may be entered in a case." MCR 2.401(B)(2). In fact, parties are given a liberal right to seek amendment of a scheduling order. See MCR 2.401(B)(2)(d); see also *Moton v Oakwood Healthcare, Inc*, No 220823, slip op at 1 (Mich Ct App May 18, 2001) (**Exhibit 11 attached hereto**) ("A party may move for modification of a scheduling order at any time.") (citing MCR 2.401(B)(2)(c)(iii)). Yet, inexplicably, the Court of Appeals found the Preliminary Case Management Order in this case to foreclose any later amendment based on changes in the case.

Only one other court appears to have squarely considered the precise issue of whether a statement in a case management order could constitute waiver of a right to arbitration. That court rejected any notion that the purpose of a case management order is to elicit waivers of substantive rights. In *In re Charter Behavioral Health Sys, LLC*, 277 BR 54, 58 (Bankr D Del 2002), the federal bankruptcy court considered whether the defendant had waived its right to arbitration by agreeing to a scheduling order that provided, among other things, that "'the parties hav[e] determined after discussion that

the matter cannot be resolved at this juncture by settlement, voluntary mediation or binding arbitration.’” The bankruptcy court held that this provision of the case management order did not operate as a waiver of arbitration because the purpose of the scheduling order was to set out parameters to efficiently and effectively manage the case, and it would not be appropriate to find waiver based on such an order. *Id.* In other words, the scheduling order was not meant to force the parties to commit to substantive positions or to compel them to forfeit rights they would otherwise have. Although Nexteer has attempted to distinguish the case on the basis that the parties in *In re Charter* stated that arbitration was not appropriate “at this juncture,” Nexteer’s attempted distinction fails because the Preliminary Case Management Order in this case likewise contains qualifying language to the same effect – *i.e.*, that it constitutes “preliminary advi[ce].” Preliminary Case Management Order at 1.

III. NEXTEER DID NOT SHOW PREJUDICE

As discussed, prejudice is a required element of any waiver of arbitration. Accordingly, regardless of how the Preliminary Case Management Order is characterized, Nexteer cannot meet its burden for establishing waiver because it cannot demonstrate prejudice. In response to Defendant-Appellants’ Application, Nexteer has argued that it was prejudiced by (1) the Defendants’ partially successful motion to dismiss, which trimmed Nexteer’s claims to only those that were legally viable, see *supra* at 11 n.1; and (2) Mando’s six-month delay in seeking arbitration, during which the Defendants served defensive discovery, but no actual discovery was exchanged.

Under such circumstances, there is simply no precedent for Nexteer's conclusory assertions of prejudice.

The filing of a motion to dismiss under MCR 2.116(C)(8) does not constitute prejudice, and hence provides no basis to avoid arbitration.¹² Courts that have considered the issue have uniformly held that seeking dismissal on the face of defective pleadings does not waive arbitration of the surviving claims. See *George S Hofmeister Family Trust v FGH Indus, LLC*, No 06-CV-13984-DT, 2007 WL 2984188, at *6-7 (ED Mich Oct. 12, 2007) (**Exhibit 12 attached hereto**) (where defendants filed four motions for dismissal before filing motion to compel arbitration, the court construed such motions as an attempt to minimize disputes at an early stage of the proceeding and held that defendants did not waive their right to arbitration); see also *Creative Solutions*, 252 F3d at 32-34 (1st Cir. 2001) (no waiver where party filed a motion to dismiss prior to moving to compel arbitration); *Williams v Cigna Financial Advs, Inc*, 56 F3d 656, 661-62 (5th Cir 1995) (same); *Rush*, 779 F.2d at 888-89 (moving to dismiss "does not waive the right to arbitrate;" no waiver of arbitration where party moved to dismiss and answered the complaint without asserting arbitration as an affirmative defense). The rationale underlying such decisions is that dismissal of claims that fail to state a cause of action

¹² The cases that Nexteer has cited – *Capital Mortg Corp v Coopers & Lybrand*, 142 Mich App 531; 369 NW2d 922 (1985); *Madison*, 247 Mich App 583; and *Best*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos 305318 and 308085), pp 4-7 all relate to the filing of motions for summary judgment under MCR 2.116(C)(10). As the Business Court explained in detail, these precedents have nothing to do with this case, because Mando moved for summary disposition under MCR 2.116(C)(8). See Reconsideration Order at 7 (**Exhibit D**) (explaining that the Business Court's dismissal was for failure to state a claim, not for failure to show triable issues of fact); see also *Capital Mortg*, 142 Mich App at 536 ("[t]he rationale for [waiver] is that summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of res judicata").

benefits all parties, by streamlining the litigation and obviating facially meritless and/or ill-pleaded claims.¹³ See *Hofmeister*, 2007 WL 2984188, at *7 (noting that “Defendants have attempted to minimize the number of counts that need to be litigated in this court or, alternatively, submitted to arbitration, through the use of pretrial motions”); see also *Rush*, 779 F.2d at 888 (“Where . . . a plaintiff files an intricate complaint, setting forth numerous claims outside the scope of, though partially related to, the arbitrable claims, he should not be altogether surprised that a defendant takes the protective step of filing a motion to dismiss, specifically permitted by Fed R Civ P 12(b) . . .”) (citation omitted). Indeed, Nexteer never sought reconsideration of, or appealed, the dismissal of its claims, and the claims would not be revived even if the case were remanded to the Business Court.

In addition, by the time Mando filed its motion to compel, the case had been proceeding for a few months, not years, and the case had not yet fully emerged from the pleadings stage. Such delay, by itself, does not constitute prejudice. See *Drexel Burnham Lambert, Inc v Mancino*, 951 F2d 348, No. 91-3213, 1991 WL 270809, at *3 (6th Cir 1991) (**Exhibit 13 attached hereto**) (six month interval between the filing of the original proceeding and the filing requesting arbitration does not constitute the type of actual prejudice necessary to support the waiver of the right to arbitration); accord, *Boynton v Medallion Homes Ltd P’ship*, unpublished opinion per curiam of the Court of Appeals,

¹³ Nexteer has incorrectly represented that motions to dismiss are not available in arbitration. The ICC provides for “partial awards on key issues” such as the lack of a claim for relief. ICC Rules, Appendix 4(a), (c) available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

issued April 24, 2003 (Docket No 235939), pp 2-3 (**Exhibit 14 attached hereto**) (defendant did not waive its right to arbitration where defendant asserted arbitration as an affirmative defense in an amended answer, but not in its initial answer). Moreover, the Defendants service of defensive discovery did not prejudice Nexteer. Although some discovery requests were served, no depositions were taken and no discovery was produced by either side either before or after Mando made its motion to compel. See *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 231; 341 NW2d 480 (1983) (serving defensive discovery does not waive the right to arbitrate). Indeed, as the Business Court said, at the time Mando filed its motion to compel, the case was still in its nascent stage and Nexteer was not prejudiced. See Arbitration Order at 12 (“[T]he case has not yet wholly emerged from the pleading stage, and discovery in this complex case remains embryonic. Under the circumstances, the court is not persuaded Nexteer has suffered prejudice sufficient to overcome a presumption in favor of arbitration.”).

CONCLUSION

For the reasons set forth above, Defendants-Appellants respectfully request that the Court take peremptory action reinstating the Business Court's judgment or grant leave and reverse the Court of Appeals' decision of February 11, 2016.

Respectfully submitted,

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Dated: December 13, 2016

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STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE
CORPORATION, a Delaware corporation,

Supreme Court No. 153413

Plaintiff-Appellee,

Court of Appeals No. 324463

v

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK, an
Individual; ABRAHAM GEBREGERGIS,
an Individual; RAMAKRISHNAN
RAJAVENKITASUBRAMONY, an Individual;
CHRISTIAN ROSS, an Individual; KEVIN ROSS,
an Individual; TOMY SEBASTIAN, an Individual;
THEODORE G. SEEGER, an individual;
TROY STRIETER, an Individual; JEREMY J.
WARMBIER, an Individual; and SCOTT
WENDLING, an Individual; jointly and severally,

Defendants-Appellants,
and

CHRISTIAN ROSS, KEVIN ROSS, TOMY
SEBASTIAN, THEODORE G. SEGER, and TONY
DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, a
Delaware corporation, LAURENT BRESSON, and
FRANK LUBISCHER,

Counter/Third-Party Defendants.

EXHIBIT LIST TO SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS

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EXHIBIT	DESCRIPTION
1	Michigan Supreme Court Order, November 2, 2016
2	<i>Best v Park West Galleries, Inc</i> , unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos 305318 and 308085), pp 4-7
3	<i>Flint Auto Auction, Inc v William B Williams Sr Tr</i> , unpublished opinion per curiam of the Court of Appeals, issued November 22, 2011 (Docket No 299552), p 2
4	<i>US Fire Ins Co v Walsh</i> , No Civ A 96-CV-8409, 1997 WL 45041, at *1 (ED Pa Jan 30, 1997)
5	<i>McLaughlin v CSX Transp, Inc</i> , No Civ A 3:06CV-154-H, 2008 WL 3850709, at *1 (WD Ky Aug 14, 2008)
6	<i>Cent Indem Co v Viacom Int'l, Inc</i> , No 02 CIV 2779(DC), 2003 WL 402792, at *6 (SDNY Feb 20, 2003)
7	<i>Sofola v Aetna Health, Inc</i> , No 01-15-00387-CV, 2016 WL 67196, at *7 (Tex Ct App Jan 5, 2016)
8	<i>Marlyn Nutraceuticals, Inc v Improvita Health Prods, Inc</i> , No CV 08-1798-PHX-MHM, 2008 WL 5068935, at *3 (D Ariz Nov 25, 2008)
9	<i>Francis v Kayal</i> , unpublished opinion per curiam of the Court of Appeals, issued May 3, 2016 (Docket No 325576), pp 3-4
10	<i>Phillips v State Farm Ins Co</i> , unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket Nos 328309 and 32974) pp 4-5
11	<i>Moton v Oakwood Healthcare, Inc</i> , unpublished opinion per curiam of the Court of Appeals, issued May 18, 2001 (Docket No. 220823), p 1o 220823, slip op at 1 (Mich Ct App May 18, 2001)
12	<i>George S Hofmeister Family Trust v FGH Indus, LLC</i> , No 06-CV-13984-DT, 2007 WL 2984188, at *6-7 (ED Mich Oct. 12, 2007)
13	<i>Drexel Burnham Lambert, Inc v Mancino</i> , 951 F2d 348, No. 91-3213, 1991 WL 270809, at *3 (6th Cir 1991)
14	<i>Boynton v Medallion Homes Ltd P'ship</i> , No 235939, 2003 WL 1950477, at *2 (Mich Ct App Apr 24, 2003)

EXHIBIT 1

Order

November 2, 2016

153413

NEXTEER AUTOMOTIVE CORPORATION,
Plaintiff-Appellee,

v

MANDO AMERICA CORPORATION, TONY
DODAK, THEODORE G. SEEGER, TOMY
SEBASTIAN, CHRISTIAN ROSS, KEVIN
ROSS, ABRAHAM GEBREGERIS,
RAMAKRISHNAN RAJA
VENKITASUBRAMONY, TROY STRIETER,
JEREMY J. WARMBIER, and SCOTT
WENDLING,
Defendants-Appellants.

SC: 153413
COA: 324463
Saginaw CC: 13-021401-CK

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

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On order of the Court, the application for leave to appeal the February 11, 2016 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether a party asserting an express waiver of a right to arbitrate must demonstrate that it was prejudiced by the actions of the party asserting that right; and if not, (2) whether the case management order in this case constituted an express waiver of the right of the defendant, Mando America Corporation, to arbitrate. The parties should not submit mere restatements of their application papers.



s1026

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 2, 2016

Clerk

EXHIBIT 2

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT BEST, DEBORAH AUSTIN, and
MARTHA SZOSTAK,

UNPUBLISHED
September 5, 2013

Plaintiffs/Counter-Defendants,
and

SHARON DAY and JULIAN HOWARD,

Plaintiffs/Counter-Defendants-
Appellants,

and

VIVIAN BEST, CHERYL CRIST, HEIDI RICE,
MICHAEL A. VALLILLO, and MARIA
VALLILLO,

Plaintiffs,

v

PARK WEST GALLERIES, INC.,

No. 305317
Oakland Circuit Court
LC No. 2008-096952-CZ

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

and

ALBERT SCAGLIONE, MORRIS SHAPIRO, and
ROYAL CARIBBEAN CRUISES, LTD,

Defendants-Appellees,

and

FINE ART REGISTRY and FRANK HUNTER,

Third-Party Defendants.

ALBERT BEST,

Plaintiff/Counter-Defendant,
and

VIVIAN BEST and HEIDI RICE

Plaintiffs,
and

SHARON DAY and JULIAN HOWARD,

Plaintiffs/Counter-Defendants-
Appellants/Cross-Appellees,
and

DEBORAH AUSTIN, CHERYL CRIST,
MICHAEL A. VALLILLO, MARIA VALLILLO,
and MARTHA SZOSTAK,

Plaintiffs/Counter-Defendants,

v

PARK WEST GALLERIES, INC.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,
and

ALBERT SCAGLIONE and MORRIS SHAPIRO,

Defendants-Appellees,
and

ROYAL CARIBBEAN CRUISES,

Defendant-Appellee/Cross-
Appellant,
and

THERESA FRANKS, FINE ART REGISTRY,
and FRANK HUNTER,

Third-Party Defendants,
and

No. 308085
Oakland Circuit Court
LC No. 2008-096952-CZ

ALBERT MOLINA and PLYMOUTH
AUCTIONEERING SERVICE,

Defendants.

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In docket no. 305317, plaintiffs Sharon Day and Julian Howard (appellants), appeal by leave granted the opinion and order granting summary disposition to Park West Galleries, Inc., Albert Scaglione, and Morris Shapiro (the Park West defendants), in this action involving fraudulent artwork.

In docket no. 308085, appellants appeal by leave granted the opinion and order granting reconsideration to Royal Caribbean Cruises (Royal Caribbean), regarding the trial court's initial denial of Royal Caribbean's motion for summary disposition. Royal Caribbean also filed a cross-appeal from the trial court's initial ruling that denied summary disposition. On this Court's own motion, these cases were consolidated for appellate review. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Appellants Day and Howard were among 10 plaintiffs who filed suit against the Park West defendants and Royal Caribbean, asserting various claims for the sale of fraudulent artwork. While passengers on a Royal Caribbean ship named "Adventures of the Seas," appellants encountered Nick Dobrota, the onboard auctioneer for Park West. Although appellants purchased artwork onboard the ship, that artwork is not at issue in this appeal. Rather, it was after disembarking from the ship that Dobrota contacted appellants and facilitated an introduction with Morris Shapiro of Park West. Appellants claimed that they relied on Dobrota and Shapiro to complete an off-board purchase. For \$422,601.50, appellants purchased what they thought was the complete unframed set of woodcuts titled "The Divine Comedy" from artist Salvador Dali.

Appellants Day and Howard received a certificate of authenticity and an appraisal indicating that the value of the artwork was \$510,000. However, some time later they approached Park West about the possibility of reselling the artwork. When Park West refused, appellants became suspicious. They obtained an independent appraisal and discovered that the artwork was fraudulent, and further inspection revealed that the artwork was damaged and incomplete.

Along with eight other plaintiffs, appellants initiated this instant lawsuit. After protracted litigation, including a previous appeal in this Court, appellants were allowed to amend their complaint to allege an agency theory of liability against Royal Caribbean. After almost two and a half years of litigation, the Park West defendants and Royal Caribbean eventually asserted the

defense of arbitration. They claimed that an arbitration clause existed in the invoice and entitled them to arbitration. While appellants argued that defendants had waived their right to arbitration, the trial court disagreed.

The trial court granted Park West's motion for summary disposition based on the arbitration clause. After initially ruling that Royal Caribbean was not entitled to summary disposition, the trial court then granted Royal Caribbean's motion for reconsideration on the basis of the arbitration clause. Appellants Day and Howard now appeal. Royal Caribbean filed a cross-appeal, contending that the trial court erred in initially denying its motion for summary disposition. These appeals have been consolidated for appellate review.

II. WAIVER OF ARBITRATION

A. Standard of Review

Appellants first contend that the trial court erred in finding that the Park West defendants were entitled to arbitration and in granting Royal Caribbean's motion for reconsideration on the same basis.

"We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration, and we review for clear error the trial court's factual determinations regarding the applicable circumstances." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001) (internal citation omitted). "This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011).

"A trial court's ruling regarding a motion for reconsideration is reviewed for an abuse of discretion." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Questions of law are reviewed de novo. *McCoig Materials, LLC*, 295 Mich App at 693.

B. Analysis

Appellants contend that the Park West defendants and Royal Caribbean waived their right to arbitration, and the trial court erred in holding otherwise. "Waiver of a contractual right to arbitrate is disfavored." *Madison Dist Pub Sch*, 247 Mich App at 588. The party contending that the right to arbitration has been waived "bears a heavy burden of proof and must demonstrate" that there was: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; (3) and prejudice resulting from the inconsistent acts. *Id.* (quotation marks and citation omitted). Whether waiver occurred depends on the facts and circumstances of each case, although this Court has given the following guidance:

It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a party waives the right to arbitration of the dispute involved. A waiver of the right to [arbitration] . . . has also been found from particular acts of participation by a party, each act being considered independently as constituting a waiver. Thus, a party has been held to have

waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim . . . without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures. [*Id.* at 589 (quotation marks, brackets, and citation omitted).]

“A waiver may be express or it may be implied when a party actively participates in a litigation or acts in a manner inconsistent with its right to proceed to arbitration.” *Capital Mortg Corp v Coopers & Lybrand*, 142 Mich App 531, 535; 369 NW2d 922 (1985).

In the instant case, appellants bore a heavy burden of demonstrating that the Park West defendants and Royal Caribbean knew of an existing right to compel arbitration, acted inconsistently with that right, and prejudice resulted from these inconsistent actions. *Madison Dist Pub Sch*, 247 Mich App at 588. The invoice containing the arbitration clause was the result of an agreement between Park West and appellants, and Park West makes no meaningful argument on appeal that it lacked knowledge of its arbitration clause.¹ Moreover, the invoice was mentioned in the initial complaint, which was served on Park West at the commencement of this litigation.²

Further, the Park West defendants engaged in a course of conduct that was inconsistent with their right to arbitrate. Appellants filed their initial complaint on December 23, 2008. On January 23, 2009, defendants Park West, Scaglione, and Shapiro filed an answer and asserted affirmative defenses, but made no mention of any right to arbitrate. Also on January 23, 2009, Park West filed a counterclaim against plaintiffs, including appellants Howard and Day, as well as a third-party complaint. While it could have done so, Park West made no mention of any right to arbitrate. On December 23, 2009, Park West filed its first motion for summary disposition. Park West presented numerous arguments in favor of dismissal, but it did not allege that arbitration was one of those grounds.³ Scaglione and Shapiro likewise filed a motion for summary disposition on December 23, 2009, and failed to invoke the arbitration clause.

The Park West defendants correctly note that there eventually was a stay in the proceedings. However, the order to stay proceedings was not entered until June 7, 2010, over 17

¹ In fact, Park West conceded at oral argument that this first prong was met.

² Even if we were to consider Scaglione and Shapiro separately from Park West in this context, the record demonstrates that they at least had knowledge of the arbitration clause on December 23, 2009, when Park West explicitly referred to it in its motion for summary disposition.

³ While Park West referenced the arbitration clause, it was to argue that appellants intentionally invoked the certificates of authenticity and not the invoice as the basis for the contract. As Park West conceded at oral argument, it did not argue in this motion that summary disposition was justified based on the arbitration clause.

months after the initial complaint was filed.⁴ According to the Park West defendants, the trial court orally lifted the stay in the proceedings on April 7, 2011, at a status conference. It was not until April 13, 2011, when Park West, Scaglione, and Shapiro finally filed a motion to amend their responsive pleadings to include the defense of arbitration. This was almost two and a half years after the initial complaint was filed.

Thus, before ever asserting a right to arbitrate, the Park West defendants filed an answer to the complaint, filed a counterclaim and third-party complaint,⁵ and filed a motion for summary disposition. As noted above, a waiver of the right to arbitrate has been found when a party files an answer, a counterclaim, third-party complaint, cross-claim, uses judicial discovery procedures, or files a motion for summary disposition without asserting the right to arbitrate. *Madison Dist Pub Sch*, 247 Mich App at 589. Thus, there was “considerable behavior inconsistent with [defendants’] right to proceed to arbitration.” *Joba Constr Co, Inc v Monroe Co Drain Comm’r*, 150 Mich App 173, 179; 388 NW2d 251 (1986).⁶

However, the Park West defendants, like the trial court, focus on the fact that in the initial complaint appellants pleaded their breach of contract claim based on the certificates of authenticity, not the invoice with the arbitration clause. The Park West defendants contend that it was not until appellants’ response to their motion for summary disposition that appellants pivoted, with a new focus on the invoice. Yet, a party has the opportunity in responsive pleadings and motions to direct the court to a preferred narrative. If Park West believed that the invoice with the arbitration clause was the basis for any alleged breach of contract, it had the opportunity to raise this argument in its responsive pleadings as an affirmative defense. It chose not to do so. Further, the language of the arbitration clause is broad: “Any disputes or claims of any kind including but not limited to the display, promotion, auction, purchase, sale or delivery of art, items, or appraisals shall be brought solely in non-binding arbitration and not in any court or to any jury.” Considering the breadth of this clause, Park West could have reasonably raised

⁴ The order stated that: “Upon Motion of Park West for adjournment of trial and an oral motion for stay of proceedings by Third-Party Defendant, Frank Hunter . . . this matter . . . is hereby stayed until further order of this Court[.]”

⁵ The counterclaim was brought by Park West, not Scaglione or Shapiro.

⁶ We also find meritless Park West’s argument that because appellants stipulated to the filing of the amended answer, they somehow conceded that the affirmative defenses in that answer were true or precluded litigation.

Nor did the filing of the amended complaint revive the ability to raise the existence of the invoice’s arbitration clause as a defense for the first time. The amended complaint did not alter the thrust or scope of plaintiffs’ allegations in a manner that would allow for the assertion of the arbitration clause at such an advanced stage of litigation. There was ample opportunity to raise that defense in response to the original complaint and the Park West and Royal Caribbean defendants chose not to do so.

it in response to the first complaint, regardless of whether appellants focused on the certificates of authenticity. This conclusion is consistent with the purpose of arbitration, which is to avoid protracted litigation. *Cipriano v Cipriano*, 289 Mich App 361, 367; 808 NW2d 230 (2010).

Royal Caribbean likewise contends that it did not waive its right to assert arbitration because it did not have knowledge of the arbitration clause and did not act inconsistently with that right. Appellants, on the other hand, allege that because Royal Caribbean adopted and ratified the contract by receiving the benefits, Royal Caribbean is charged with knowledge of the terms and clauses and acted inconsistently with the right to arbitrate.

As noted above, appellants filed their initial complaint on December 23, 2008, and the invoice was mentioned in the complaint. On January 23, 2009, Park West filed a third-party complaint and attached an exhibit of Fine Art Registry's website, which included a copy of the invoice, although the legibility is dubious. However, Royal Caribbean at a minimum had notice that there was an invoice containing various terms and conditions. On March 2, 2009, in lieu of filing an answer to appellants' complaint, Royal Caribbean filed a motion to dismiss for failure to state a claim, but did not mention the arbitration agreement. On May 6, 2009, Royal Caribbean filed a reply brief to appellant's response to the motion to dismiss, and again did not raise any arguments relating to arbitration. The trial court then granted Royal Caribbean's motion to dismiss on May 15, 2009.

Another copy of the invoice, with the arbitration clause, was attached to appellants' motion to amend their complaint on June 5, 2009. Royal Caribbean filed a response to appellants' motion to amend the complaint on June 30, 2009, and while they opposed the motion, they again did not reference the arbitration clause. On December 11, 2009, this Court ordered that plaintiffs be permitted to amend their complaint.

On December 23, 2009, Park West filed a motion for summary disposition and for the first time made an explicit reference to the invoice and the arbitration clause. While there was a stay entered on June 7, 2010, Royal Caribbean was not a party to that order. Royal Caribbean did not file its motion for summary disposition until June 21, 2011. For the first time on that date it contended that the arbitration clause precluded the current litigation. Royal Caribbean then filed its answer to the amended complaint on October 21, 2011, and raised the defense of arbitration.

In light of these lengthy proceedings wherein Royal Caribbean did not assert any right to arbitration until almost two and a half years after the complaint was filed, there was sufficient evidence that Royal Caribbean knew of the arbitration clause and acted inconsistently with that knowledge. When the initial complaint was filed, it referenced the invoice. Further, a legible copy of the invoice with the arbitration clause was submitted on June 5, 2009, attached to appellant's motion to amend the complaint. While Royal Caribbean filed a response to this motion, they did not mention the arbitration clause. In fact, Royal Caribbean did not assert the arbitration clause as a defense until June 21, 2011. After Royal Caribbean had notice that there was an arbitration clause, they failed to assert that right promptly. As noted above, filing

responsive pleadings and motions without asserting a right to arbitration is inconsistent with that right. *Madison Dist Pub Sch*, 247 Mich App at 589.⁷

Moreover, prejudice would result if the Park West defendants and Royal Caribbean were allowed to invoke the arbitration clause at this late stage of the litigation. *Madison Dist Pub Sch*, 247 Mich App at 588. At the time of this appeal, the litigation has been going on for over four years and both parties have expended significant time and resources. If this Court “referred the matter to arbitration at this point after [appellants] expended resources to litigate the merits of this case in the trial court, and this this Court[,]” prejudice would result. *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356-357; 581 NW2d 781 (1998).

Although the burden to establish a waiver of arbitration is heavy, appellants have met that burden in this case. The trial court’s ruling that the Park West defendants did not waive their right to arbitrate was in error. Because the trial court’s ruling on the motion for reconsideration was based on that same erroneous finding as it applied to Royal Caribbean, it was outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.⁸

III. SECTION 12(B) OF THE CRUISE TICKET CONTRACT

A. Standard of Review

On cross-appeal, Royal Caribbean appeals from the trial court’s initial order denying its motion for summary disposition. Royal Caribbean posits that Section 12(B) of the cruise ticket contract applied and precluded the instant litigation. “This Court reviews de novo a trial court’s ruling on a motion for summary disposition.” *Anzaldua*, 292 Mich App at 629. “Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo.” *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004).

B. Analysis

Royal Caribbean contends that the trial court erred in failing to apply Section 12(B) of the cruise ticket contract, which states:

NO SUIT SHALL BE MAINTAINABLE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT FOR ANY CLAIM, INCLUDING BUT NOT LIMITED TO, DELAY, DETENTION, PERSONAL INJURY, ILLNESS OR DEATH OF PASSENGER UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL PARTICULARS, SHALL BE DELIVERED TO CARRIER AT ITS PRINCIPAL

⁷ While appellants also challenge Royal Caribbean’s authority to invoke the arbitration provision, we need not address this issue as any right Royal Caribbean had was waived.

⁸ We decline to address appellants’ alternate arguments for why the trial court’s ruling was in error. Because Park West did not prevail on this issue, it is not entitled to costs and attorney fees.

OFFICE WITHIN SIX (6) MONTHS FROM THE DAY CAUSE OF ACTION OCCURRED; AND IN NO EVENT SHALL ANY SUCH SUIT FOR ANY CAUSE AGAINST CARRIER, THE VESSEL, OR THE TRANSPORT BE MAINTAINABLE UNLESS SUCH SUIT SHALL BE COMMENCED (FILED) WITHIN ONE (1) YEAR FROM THE DAY WHEN THE CAUSE OF ACTION OCCURRED AND PROCESS SERVED WITHIN THIRTY (30) DAYS AFTER FILING, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

Even assuming, *arguendo*, that the cruise ticket contract applied to the disputed transaction, Royal Caribbean's arguments are meritless.⁹ In its initial ruling on Royal Caribbean's motion for summary disposition, the trial court found Section 12(B) to be unavailing. The trial court held that the statute of limitations set forth in MCL 600.5855, the fraudulent concealment statute, governed. MCL 600.5855 states:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

"Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe*, 264 Mich App at 642 (quotation marks and citation omitted). As this Court explained in *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 48; 698 NW2d 900 (2005):

Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. If liability were discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitations. [Quotation marks and citation omitted.]

On appeal, appellants contend that evidence of fraudulent concealment was that Dobrota made false representations about the authenticity of the artwork, and Park West provided appellants with an untruthful certificate of authenticity and appraisal. "It is quite clear that only

⁹ Royal Caribbean contends that Section 12(B) applied, appellants failed to meet the requirements set forth in that section, and MCL 600.5855 was inapplicable because there was no evidence of fraudulent concealment. Neither party has offered any challenge to the threshold finding that MCL 600.5855, if applicable, would supersede Section 12(B).

actions *after* the alleged injury could have concealed plaintiff[s'] causes of action against defendant[s] because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist. So, in focusing on the fraudulent-concealment claim, we focus on defendant[s'] alleged actions after the alleged abuse." *Doe*, 264 Mich App at 641 (emphasis added). Thus, any conduct plaintiffs contend occurred before the alleged injury cannot be the basis for their claims of fraudulent concealment.

A "plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Doe*, 264 Mich App at 643 (quotation marks and citation omitted). In the instant case, appellants alleged in their amended complaint that they received the invoice then wired the money to Royal Caribbean on March 17, 2008. Appellants asserted that after the purchase, they received an email from Dobrota on March 19, 2008, congratulating them on purchasing a masterpiece created by one of the world's most famous and influential artists. The artwork was then shipped, and appellants received a certificate of authenticity and an appraisal dated April 4, 2008. In light of this timeline, appellants have asserted sufficient factual allegations to raise a question of fact regarding whether there were material misrepresentations, including the certificate of authenticity and appraisal, *after* their cause of action arose.

Moreover, whether any of these apparently false representations constituted fraudulent concealment still remains a question of fact. As noted above, fraudulent concealment involves more than just a false statement. Park West and its agents had to engage in deceptive behavior that was "planned to prevent inquiry or escape investigation[.]" *Doe*, 264 Mich App at 642. In their amended complaint, plaintiffs contend that all defendants made material representations knowing they were false or reckless and with bad faith.¹⁰ Further, while Royal Caribbean contends that appellants did not use reasonable diligence to discover this cause of action, they have cited no authority to justify a finding that reasonableness in this context would require appellants to either recognize the fraud simply by looking at the artwork or require them to obtain an independent expert at their own expense.

Because a "disputed question of fact" remains, this is not a question of law for this Court to decide. *Doe*, 264 Mich App at 638; see also *Int'l Union United Auto Workers of Am v Wood*, 337 Mich 8, 13; 59 NW2d 60 (1953) ("Questions of concealment and diligence are questions of fact.").

IV. SECTION 4 OF THE CRUISE TICKET CONTRACT

A. Standard of Review

Lastly, Royal Caribbean contends that the trial court initially erred in finding that Section 4 of the cruise ticket contract did not apply and that Royal Caribbean was not entitled to

¹⁰ While Royal Caribbean claims that fraudulent concealment cannot be based on actions by a third-party, this Court has already ruled that appellants sufficiently pleaded an agency theory as it relates to Royal Caribbean. Docket No. 293502.

summary disposition. “This Court reviews de novo a trial court’s ruling on a motion for summary disposition.” *Anzaldúa*, 292 Mich App at 629.

B. Analysis

Royal Caribbean contends that appellants failed to comply with Section 4 of the cruise ticket contract, which states:

Any medical personnel, masseuse, hair stylist, manicurist or other service providers on board of the Vessel or on Transport are . . . independent contractors and not acting as agents or representatives of Carrier. Carrier assumes no liability whatsoever for any treatment, diagnosis, advice, examination or other services provided by such persons. Passenger shall pay for all medical care requested or required, whether abroad or ashore, including the cost of any emergency medical care or transportation incurred by Carrier.

The trial court found that this section applied to service providers, not vendors selling goods like artwork to passengers.

We agree with the trial court that Section 4 of the cruise ticket contract did not preclude the current litigation. It is axiomatic that the language of a contract is given its plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). “An unambiguous contractual provision is reflective of the parties’ intent as a matter of law, and if the language of the contract is unambiguous, we construe and enforce the contract as written.” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (quotation marks, citation, and brackets omitted). Further, “contracts must be construed so as to give effect to every word or phrase as far as practicable.” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (quotation marks and citation omitted).

Here, Section 4 specifically refers to medical personnel, masseuses, hair stylists, manicurists and other service providers. Royal Caribbean focuses on the term “other service providers” to suggest that Park West and its employees were providing a service in that they were doling out advice and expertise, and were therefore included in Section 4. However, “under the doctrine of *noscitur a sociis*, a word or phrase is given meaning by its context or setting.” *Bloomfield Estates Improvement Ass’n, Inc v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007) (quotation marks and citation omitted). In context of the other words in Section 4, none of the providers listed are similar to Park West and its employees. Hair stylists, medical personnel, manicurists, and masseuses all provide services for payment, which do not involve the transfer of goods. Park West and its employees, in contrast, existed solely to sell artwork in exchange for money. While Park West contends that its employees provided advice to passengers, even if that were true, that function is still intricately connected to the sale of goods, unlike the other service providers listed in Section 4.

This interpretation is bolstered by the remaining language in Section 4, which states that Royal Caribbean assumed no liability for “treatment, diagnosis, advice, examination or other services provided by such persons” and that passengers had to “pay for all medical care requested or required[.]” This language implicates medical and health providers, not vendors

selling art. See *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114, 116 (2011) (“When a court interprets a contract, the entire contract must be read and construed as a whole.”). Thus, Royal Caribbean has failed to establish that Section 4 of the cruise ticket contract applied and precluded the current litigation.

V. CONCLUSION

The Park West defendants and Royal Caribbean waived their right to arbitration and the trial court erred in finding otherwise. A question of fact remains regarding whether fraudulent concealment existed to toll the limitations period set forth in Section 12(B) of the cruise ticket contract. Lastly, Royal Caribbean has failed to establish that Section 4 of the cruise ticket contract applied and precluded the current litigation.

We have reviewed all other arguments raised by the parties in the briefs and found them to be without merit. We reverse and remand for proceedings consistent with this opinion.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Michael J. Riordan

EXHIBIT 3

STATE OF MICHIGAN
COURT OF APPEALS

FLINT AUTO AUCTION, INC.,

Plaintiff/Counter Defendant-
Appellant,

v

THE WILLIAM B. WILLIAMS SR TRUST, and
Estate of WILLIAM B. WILLIAMS SR,

Defendants/Counter Plaintiffs-
Appellees.

UNPUBLISHED
November 22, 2011

No. 299552
Genesee Probate Court
LC No. 09-186541-CZ

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition in favor of defendants. We affirm.

The underlying facts in this matter are largely not relevant to this appeal. At the time of William B. Williams Sr's death, he was a party to a "Deferred Compensation Agreement" with plaintiff Flint Auto Auction, Inc (FAA). FAA was a family-owned business that had originally been founded in part by Williams Sr's father and, at the time of Williams Sr's death, his biological son was one of the principals of FAA. The Deferred Compensation Agreement had been part of a plan to transition ownership and operation of FAA from one generation to the next. Williams Sr was cared for toward the end of his life by Lisa LeClair, the daughter of his then-deceased wife. LeClair was named trustee of Williams Sr.'s trust and Williams, Sr's personal representative; she also received a significant portion of his estate. Two separate but related lawsuits were commenced against Williams Sr's estate: the instant action in circuit court, and a probate action.

The instant action was initiated seeking a declaratory judgment that FAA had made all of the payments it was required to make under the Deferred Compensation Agreement. It appears that no action was taken in this matter for some time after the filing of the complaint, pursuant to an informal agreement worked out between the attorneys. The matter was eventually transferred to probate court and "informally abeyed." Defendants filed an answer and counterclaim almost a year after the complaint was filed, and at the same time, they raised the affirmative defense of an arbitration clause in the Deferred Compensation Agreement. Defendants served plaintiff with

several discovery requests, including a mix of requests for admission, requests for production of documents, and interrogatories. Plaintiffs contended that defendants had waived their right to arbitrate by filing the counterclaim, engaging in discovery, and otherwise engaging in behavior inconsistent with the right to arbitrate despite being aware of the arbitration clause. Plaintiffs responded to discovery, and defendants made use of the court's subpoena power. No depositions were conducted.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), under which a claim may be barred by the existence of an arbitration agreement. There is no dispute as to the existence of the arbitration agreement; rather, the issue is whether defendants waived their rights under that agreement. The trial court concluded that defendants did not waive their rights. We agree.

We review a grant of summary disposition de novo. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 591; NW2d 364 (1998). When determining whether a party has waived its right to arbitrate, the trial court's factual findings are reviewed for clear error, but its decision whether those facts constituted a waiver is reviewed de novo. *Madison Dist Pub Schs v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). Waiver is disfavored, and the party asserting a waiver must prove (1) the waiving party had knowledge of an existing right to compel arbitration, (2) that party engaged in acts inconsistent with the right to arbitrate, and (3) prejudice to the party asserting waiver resulted from the inconsistent acts. *Id.* Waiver may be express or it may be implied by active participation in litigation or other acts inconsistent with the right to arbitrate. *Id.* at 589; *Joba Constr Co v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986). The first element is undisputedly established.

The existence of a waiver depends on the particular facts of the case. *Madison Dist Pub Schs*, 247 Mich App at 588. Filing a counterclaim without demanding arbitration may constitute a waiver of arbitration. *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 230; 341 NW2d 480 (1983). Additionally, "[p]ursuing discovery in a court may be viewed as being inconsistent with demanding arbitration since discovery is not generally available in arbitration." *Id.* at 231. However, the mere fact that a party conducts discovery is not proof positive that a party has waived its right to arbitrate, especially if discovery was conducted for the purposes of defending an action. *Id.* at 231. Conversely, the fact that a party has properly pleaded a right to arbitrate does not mean that it cannot waive the right through inconsistent acts. See *North West Michigan Const, Inc v Stroud*, 185 Mich App 649, 652; 462 NW2d 804 (1990). Likewise, an anti-waiver clause in a contract does not preclude a finding that a party waived a contractual right, although the party asserting a waiver must show that the parties to the contract mutually intended to waive or modify it. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 365, 372-374; 666 NW2d 251 (2003).

Although this case was pending for some considerable time before defendants sought arbitration, much of that time was pursuant to some kind of mutual understanding between the parties. Defendants did engage in some discovery. Typically, however, the kind of discovery that will trigger a waiver is much more extensive than the document requests and subpoenas here, and is accompanied by other actions inconsistent with arbitration. In *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 596-597; 637 NW2d 526 (2001), the plaintiff carried on twenty months of litigation and extensive discovery that included depositions before demanding

arbitration. In *Joba Const Co, Inc*, 150 Mich App at 179, the plaintiff not only engaged in discovery, but also filed a complaint after having requested arbitration and failed to raise arbitration as a defense to a counterclaim. A party's participation in discovery is not *per se* a waiver of that party's right to arbitration. Rather, the fact and extent of participation in discovery are facts to consider when evaluating whether a party's behavior has, as a whole, been inconsistent with arbitration. We agree with the trial court that defendants' acts were not sufficiently inconsistent with arbitration to constitute a waiver.

A party is prejudiced by inconsistent acts of the other party when it has "expended resources to litigate the merits of [its] case in the trial court." *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 357; 581 NW2d 781 (1998). Plaintiff argues that it expended tremendous resources on this matter due to defendants' discovery requests; defendants argue that plaintiff's burden was minimal. It appears that a party must expend more than just some time and resources in litigation to constitute *sufficient* prejudice. *Madison Dist Pub Schools*, 247 Mich App at 599-600. For most of the pendency of this case, it appears that nothing happened; while plaintiff clearly expended some effort responding to defendants' discovery requests, they have not exerted the level of effort this Court has previously found to require a waiver. In light of our public policy favoring arbitration, we do not believe plaintiff has satisfied its burden of establishing a waiver.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause

EXHIBIT 4

1997 WL 45041

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

UNITED STATES FIRE
INSURANCE COMPANY, Plaintiff,

v.

Lynn Cutler WALSH, Administratrix, of The
Estate of James Walsh, Deceased, Defendant.

No. CIV. A. 96-CV-8409.

|
Jan. 30, 1997.

MEMORANDUM

BUCKWALTER, J.

I. INTRODUCTION

*1 Plaintiff United States Fire Insurance Company ("Plaintiff") has brought this action for declaratory relief against Defendant Lynn Cutler Walsh, Administratrix of the Estate of James Walsh ("Defendant"). In the Complaint, plaintiff is seeking a determination by the Court that it is not obligated to provide uninsured motorist benefits to or on behalf of defendant in connection with fatal injuries the deceased James Walsh sustained in a motor vehicle accident.

Presently before the Court for disposition are defendant's Motion to Dismiss and plaintiff's response thereto. For the following reasons, defendant's motion will be granted.

II. ARGUMENT

In its response to the Motion to Dismiss, plaintiff argues that defendant waived her right to arbitration. In particular, plaintiff alleges that defendant agreed "to the resolution of the coverage issues involved in the claim for underinsured motorist benefits in Court by way of a declaratory judgment action." Defendant counters she "has at all relevant times been under the impression that the counsel for the United State Fire Insurance Company intended to file a declaratory judgment action before a competent panel of arbitrators as is called for in ... [the] contract of insurance...." I conclude that defendant has not waived her right to arbitration.¹

¹ In its reply to the Motion to Dismiss, Plaintiff states that "[t]he policy of insurance does, in fact, provide for arbitration...." In light of this comment, the Court will assume that the parties agree that an arbitration panel has the proper authority to decide this coverage dispute.

As a matter of public policy, our courts favor the settlement of disputes by arbitration. *Goral v. Fox Ridge, Inc.*, 683 A.2d 931, 933 (Pa.Super.Ct.1996). Nevertheless, the right to enforce an arbitration clause can be waived. *Id.* A waiver of the right to proceed to arbitration may be expressly stated, or it may be inferred from a "party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary. *Id.* (citing *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assoc. Ltd. Partnership*, 416 Pa.Super. 45, 610 A.2d 499, 501 (Pa.Super.Ct.1992). Waiver "should not be lightly inferred[,] unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right. *Id.* (citing *Kwalick v. Bosacco*, 329 Pa.Super. 235, 478 A.2d 50, 52 (Pa.Super.Ct.1984).

In the instant case, there simply is no undisputed evidence to support the claim that defendant expressly waived her right to arbitration. Neither has plaintiff demonstrated that defendant's acts or language are inconsistent with defendant's goal of resolving the coverage dispute through arbitration. Therefore, in light of the public policy concerns discussed above, the defendant's motion will be granted.

An order follows.

ORDER

AND NOW, this 30th day of January, 1997, upon consideration of defendant's Motion to Dismiss the Complaint (Docket No. 2) and plaintiff's response thereto (Docket No. 4), it is hereby ORDERED and DECREED that said Motion is GRANTED, and plaintiff's action for declaratory relief is DISMISSED.

All Citations

Not Reported in F.Supp., 1997 WL 45041

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EXHIBIT 5

2008 WL 3850709

Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
at Louisville.

John D. McLAUGHLIN, Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant/Third Party Plaintiff

v.

Cattron–Theimeg, Inc., Third Party Defendant.

Civil Action No. 3:06CV–154–H.

|
Aug. 14, 2008.

Attorneys and Law Firms

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Catherine M. Stevens, Susan J. Pope, Frost Brown Todd
LLC, Lexington, KY, for Third Party Defendant.

MEMORANDUM OPINION AND ORDER

JOHN G. HEYBURN II, Chief Judge.

*1 The Court now considers the motion of the Third Party Defendant, Cattron–Theimeg, Inc. (“Cattron”), to stay the current proceedings and compel arbitration of the dispute between it and Defendant, CSX Transportation, Inc. (“CSX”).

Plaintiff, McLaughlin, filed this action against CSX, alleging that while he was employed as a conductor working in the Osborn Yard in Louisville, he was injured when a remote control device malfunctioned causing the locomotive to automatically apply its emergency brakes. When this happened, McLaughlin was thrown off the train and allegedly sustained injuries. McLaughlin claims that CSX violated the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (“FELA”) as well as the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.* by providing

an unsafe remote control device that was not in a proper condition to be safely operated without unnecessary danger of personal injury to the operator.

In November, 2006, CSX filed a third party complaint adding Cattron as a Defendant alleging that Cattron manufactured and sold the operating control unit and that it had promised to indemnify CSX for any injuries that arose out of its use. The Cattron–CSX Agreement also contained an ‘arbitration provision, which Cattron now asserts requires a stay of the current third party proceedings.

CSX does not argue that the arbitration agreement is invalid. Indeed, arbitration agreements are strongly favored, though a party may waive that right either expressly or implicitly. *O.J. Distributing, Inc. v. Hornell Brewing Company*, 340 F.3d 345, 365 (6th Cir.2003). Waiver will only be recognized, however, where the party opposing arbitration shows specific conduct completely inconsistent with an intent to arbitrate and some prejudice to itself due to the subsequent demand of arbitration. *Id.* at 356.¹

¹ The Court does not find *American Locomotive Co. v. Gyro Process Co., et al.*, 185 F.2d 316, 319–20 (6th Cir.1950), to be particularly relevant or helpful in these entirely different circumstances.

This case presents a close call. On one hand, Cattron never expressly waived its contractual right to arbitrate this dispute and, in fact, has always asserted the arbitration defense in its answers to the third party complaint. On the other hand, it did not move for a stay throughout one and half years of litigation and it actively participated in that litigation. Many of its actions were entirely inconsistent with the idea of arbitrating its dispute with CSX. The question of contractual indemnity is one which might easily and naturally be decided at the same time as CSX's liability under the various federal statutes. Consequently, CSX is inconvenienced by not having the indemnity issue resolved with the liability claims against it.

Most significant, Cattron waited until one month prior to the scheduled trial date to assert its arbitration rights directly. By waiting so long, while voluntarily sampling the litigation process, the Court concludes that Cattron has waived the right to now obtain a stay to which it might earlier have been entitled.

The Court recognizes that Cattron may well avail itself of the interlocutory appeal provisions contained in the 1988 Judicial Improvements and Access to Justice Act, 9 U.S.C. § 16. Such an appeal, if taken, might well be accompanied by a motion in this Court to stay any proceedings relative to the CSX/Cattron dispute. Regardless, none of these actions should have any impact upon the trial of McLaughlin's underlying claims. The Court makes its ruling irrespective of its potential inconsequence.

*2 Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motion of Cattron–Theimeg, Inc., to stay the third party proceedings and compel arbitration is DENIED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3850709

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EXHIBIT 6

2003 WL 402792

Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

CENTURY INDEMNITY
COMPANY et al., Petitioners,
v.

VIACOM INTERNATIONAL, INC., Respondent.

No. 02 Civ. 2779(DC).

Feb. 20, 2003.

Insurer petitioned to compel insured to arbitrate their insurance coverage dispute pursuant to arbitration clause of settlement agreement between the parties. On insured's motion to dismiss or stay petition, the District Court, Chin, J., held that: (1) issue of whether dispute was arbitrable under agreement was for court to decide; (2) dispute was arbitrable under agreement; and (3) insurer did not expressly or impliedly waive its contractual right to arbitrate dispute by its participation in insured's state court declaratory judgment action.

Motion denied, and petition granted.

West Headnotes (4)

[1] **Insurance**

Disputes and Matters Arbitrable

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)7 Arbitration
217k3271 Agreements to Arbitrate
217k3277 Disputes and Matters Arbitrable

Issue of whether insurance coverage dispute was arbitrable, pursuant to arbitration clause in settlement agreement between insurer and insured, was for district court to decide, since arbitration clause in agreement did not provide clear and unmistakable evidence referring matter of arbitrability to arbitrator.
9 U.S.C.A. § 4.

1 Cases that cite this headnote

[2] **Insurance**

Disputes and Matters Arbitrable

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)7 Arbitration
217k3271 Agreements to Arbitrate
217k3277 Disputes and Matters Arbitrable
Arbitration clause, providing that any dispute or claim in any way arising out of settlement agreement between insurer and insured was arbitrable, extended to insured's claim for coverage under renewal policy which allegedly had identical policy number as that mentioned on face of agreement; clause was susceptible to interpretation that it covered disputes related to other theoretically distinct policies with identical number.

Cases that cite this headnote

[3] **Insurance**

Waiver or Estoppel

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)7 Arbitration
217k3270 Waiver or Estoppel
Insurer did not expressly waive its contractual right, pursuant to settlement agreement, to arbitrate insurance coverage dispute with insured, even though insurer did not specifically include arbitration provision as affirmative defense to insured's state court declaratory judgment action, and insurer certified to state court that no arbitration was contemplated; insurer included in its answers affirmative defense of prior settlement and release, and insured's initial complaints acknowledged settlement agreement, and asserted no coverage that would conflict with it.

1 Cases that cite this headnote

[4] **Insurance**

Waiver or Estoppel

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)7 Arbitration
217k3270 Waiver or Estoppel

Insurer did not constructively waive its right, under settlement agreement, to arbitrate insurance coverage dispute with insurer, by engaging in protracted litigation in state court action that prejudiced insured; although state action was filed more than two years earlier, it was still in its early stages, no substantive motions had been noticed, and insured's voluntary exchange of documents with insurer did not prejudice it.

1 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM DECISION

CHIN, J.

*1 In this diversity case, petitioners Century Indemnity Company and related companies ("Century") seek to compel respondent Viacom International ("Viacom") to arbitrate their insurance coverage dispute pursuant to the arbitration clause of a settlement agreement between the parties. Viacom moves to dismiss or stay the petition, arguing primarily that the matter is already being litigated in New Jersey state court, where Century has purportedly waived its right to arbitration. For the reasons that follow, Viacom's motion is denied and the petition to compel is granted.

BACKGROUND

The following facts, drawn from the petition and other documents annexed to the pleadings, are not in dispute, except as otherwise noted.

A. The Settlement Agreement

On April 22, 1996, Century and Viacom entered into an agreement (the "Agreement") settling insurance coverage disputes, including a lawsuit in New York Supreme Court, stemming from environmental contamination at several sites owned by Viacom and insured by Century. Under the Agreement, Century paid Viacom for certain "site" and "policy" releases. The former released Century from any obligation to Viacom for environmental claims at specific sites, under "any and all Century policies issued" to Viacom; the latter released Century from any obligation, "past, present and future," under specific policies, for claims at any site. (Pet. ¶ 6; Agreement ¶ 10).¹

¹ References to "Pet." are to the Second Amended Petition, the operative pleading in this case. The Second Amended Petition was filed under seal; however, save for incorporating portions of the Agreement, it is nearly identical to the first, publicly filed Petition. As the parties have endeavored to keep the terms of the Agreement confidential and have filed their papers under seal, I have omitted details of the Agreement that are not necessary to decide this motion.

The Agreement includes policy releases concerning Century policy numbers CIZ 42 61 97 and XCP 145057; the primary site releases concern Viacom's Eagle Mine and associated facilities in Colorado. (Pet. ¶¶ 8-10; Agreement ¶¶ 10-11). The Agreement provides that all coverage, "whether past or present, known or unknown, is completely and irrevocably rescinded" and payment under the Agreement constitutes "an exhaustion of all applicable limits of liability" under the policies. (Agreement ¶¶ 20, 29).

The Agreement contains a choice of law and arbitration clause that provides:

This Agreement shall be governed by the law of the State of New York.... The parties agree that any

dispute or claim in any way arising out of this Agreement shall be settled by arbitration within the State of New York, and judgment upon the award rendered by the arbitrator(s) may be entered in either the Supreme Court of the State of New York for New York County or the United States District Court for the Southern District of New York. The parties hereby consent to the jurisdiction of said courts for such purpose.

(Agreement ¶ 40). The Agreement also contains an integration clause (*id.* ¶¶ 23, 34), and a provision that “[a]ny delay or failure by the parties to exercise any of their respective rights or obligations hereunder shall not constitute a waiver of any such rights or obligations under the Agreement.” (*Id.* ¶ 35).

B. *The New Jersey Action*

On November 24, 1999, Viacom filed a declaratory judgment and damages action in Superior Court in Somerset County, New Jersey. The action now involves claims related to environmental contamination at 46 sites in 17 states, and spans decades of coverage provided by approximately 84 primary and excess insurance carriers, including Century. The 77-page initial complaint referred to Century policy number CIZ 42 61 97 for the period January 1, 1983 to January 1, 1984, and separately listed the same policy number, CIZ 42 61 97, for the period January 1, 1984 to January 1, 1985. (N.J.Compl.Ex. J). The complaint included claims relating to the Eagle Mine site in Colorado (N.J.Compl.¶ 169), but at the same time referred to the New York litigation begun in 1993 and indicated that Viacom “makes no claim against any [insurer] with which it has settled for any costs or damages falling within the scope of the releases [Viacom] granted.” (N.J.Compl.¶ 171). Hence, the complaint refers to dozens of primary and excess insurance policies, including other policies issued by Century.

*2 Century filed its answer to the complaint on January 26, 2000. The answer did not assert a right to arbitration as a defense to any claims, although Century raised “prior settlement and release” as an affirmative defense. (Century N.J. Answer at 51). The final page of the answer contained the required certification pursuant to New

Jersey Court Rule 4:5-1, stating that “this action is not the subject of any presently pending action or arbitration and [counsel is] not aware that any such actions are contemplated.” (Century N.J. Answer at 57).

1. *The Settlement Process*

In February 2000, Viacom asked the New Jersey court to stay “all aspects of the insurance litigation in favor of an informal discovery/settlement process” to be supervised by the court. (Napierkowski Aff. Ex. D). The court held a conference in July, and issued Case Management Order (“CMO”) No. 1 on September 21, 2000, setting out the terms of the first informal document production by Viacom and the carriers. The parties agreed to maintain the confidentiality of the information exchanged; Viacom provided material to some carriers on the condition that the information would not be shared with other carriers. CMO No. 1 § IV(A) provided that “[a]ll discovery, motion practice and other matters of formal litigation between Viacom ... and the Carriers ... are stayed until further order of the Court.” The court continued the stay of formal litigation as it supervised the progress of informal discovery through six additional CMO's, through May 2002. No substantive motions were filed during this period, and no depositions or formal discovery occurred. Century consented to the entry of the CMO's and never mentioned a right to arbitrate at any of the accompanying case management conferences. Viacom eventually produced some 400,000 pages of documents and placed them in a document repository.

Viacom filed an amended complaint on October 23, 2000; the amended complaint included policy number CIZ 42 61 97, listed at two exhibits. (Am.Compl.Exs.B, J). Viacom filed a second amended complaint on January 23, 2001. This pleading does not list CIZ 42 61 97. Viacom insists this omission was a clerical error. Century maintains that the second amended complaint “abandoned” the disputed claims following “the mutual exchange of the Settlement Agreement” and other confidential documents on October 31, 2000, noting that the policy was deleted from two separate exhibits. (*See* Century Br. at 6-7; Napierkowski Aff. ¶¶ 9-11). The second amended complaint also repeats the language of the original complaint acknowledging the litigation begun in 1993 against certain carriers and the resulting Agreement releasing them. (*See* Compl. ¶ 171; Second Am. Compl. ¶ 169).

Viacom contends it never intended to abandon its claims against the disputed policy. Viacom notes that on June 8, 2001, for example, Viacom provided Century with expert materials allocating damages under the disputed policy. (Arffa Aff. Exs. E-F (enclosing “[a]dditional cost backup packages relating to the ... Eagle Mine ... site[]”).) Century does not dispute that Viacom made coverage demands for the Eagle Mine site and under policy CIZ 42 61 97, even after the second amended complaint. The demand occurred during a phase of the settlement process following the May 4, 2001 case management conference, where the New Jersey court ordered Viacom to attempt “to provide each carrier with settlement material and a settlement demand by July 31, 2001.” (CMO No. 3). Viacom forwarded the material on June 8, 2001; documents and expert material were exchanged in the ensuing months. Century made a counter-offer at a meeting on April 10, 2002. Century’s response included the assertion that Viacom had released coverage for the Eagle Mine site and the CIZ 42 61 97 policy.

2. The Arbitration Demand

*3 That same day, April 10, 2002, Century sent Viacom a letter requesting Viacom to agree to arbitrate disputes relating to two of the claims in the New Jersey action. The letter indicated that, contrary to the releases provided under the Agreement, Viacom apparently sought to recover from Century for the Eagle Mine site, under policies dating from the 1950’s, and for the Palmerton, Pennsylvania zinc site, under Century policy number CIZ 42 61 97. The letter also indicated that “Viacom should agree to a complete stay of all proceedings with respect to the Eagle Mine and Palmerton Zinc sites pending arbitration.” (Arffa Aff. Ex. G). Century restated the demand by letter dated April 22, 2002, and threatened that it would “seek to stay *all discovery* by any party on the Eagle Mine Site and the Palmerton Site pending the outcome of the arbitration.” (Arffa Aff. Ex. H).

Apparently, Viacom never responded, and on May 13, 2002, Century served and filed the instant petition to compel arbitration. On May 24, 2002, Viacom filed a motion asking the New Jersey court to declare that Century “by its conduct in this action, has waived any right to arbitrate Viacom’s claims in this action or any portion of those claims.” (Arffa Aff. Ex. I).

3. The New Jersey Court Denies Viacom’s Motion

In their papers filed in this Court, the parties spent a great deal of time discussing whether the Court should abstain from deciding the matter in light of the motion before the New Jersey court, and whether this Court or the state court had the power to compel arbitration in this district. These objections are now moot, as the New Jersey court has ruled. *Viacom Int’l, Inc. v. Admiral Ins. Co.*, Docket No. SOM-L-1739-99, Order dated Aug. 23, 2002. In a 13-page decision, that court found the Southern District of New York was the proper forum to decide the waiver issue due to the forum selection clause in the Agreement which “divests the New Jersey Superior Court of jurisdiction.” *Id.* at 8. The court noted that 9 U.S.C. § 4 requires that arbitral proceedings take place “within the district in which the petition for an order directing such arbitration is filed.” *Id.* Nonetheless, the court proceeded to analyze the waiver issue, noting it would conclude that “[i]t cannot be said that Century has abandoned [its] right arbitrate at this early stage of the litigation.” *Id.* at 11. The court stayed discovery “only with regard to the Century policy involved in the New York litigation.” *Id.* at 13.

DISCUSSION

I. Applicable Law

A. Enforcing an Agreement to Arbitrate

The Federal Arbitration Act (“FAA”) reflects Congress’s strong preference for arbitration. The FAA, codified at 9 U.S.C. §§ 1-14, provides that written provisions to arbitrate controversies in any contract involving interstate commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* § 2. “There is a strong federal policy favoring arbitration as an alternative means of dispute resolution.” *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir.2001). Indeed, the Supreme Court has stated that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). This is especially so, where, as here, the existence of an arbitration agreement is undisputed. See *ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir.2002).

*4 In light of this policy, “[t]he Second Circuit has established a two-part test for determining arbitrability of claims not involving federal statutes: (1) whether the parties agreed to arbitrate disputes at all; and (2) whether the dispute at issue comes within the scope of the arbitration agreement.” *ACE Capital Re Overseas Ltd.*, 307 F.3d at 28. As for the matter of who determines arbitrability, that issue “may only be referred to the arbitrator if ‘there is “clear and unmistakable” evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.’” *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir.2002) (quoting *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir.1996)).

B. Waiver of the Arbitration Right

A party may expressly waive its right to arbitration, and if so, prejudice need not be shown. *See Gilmore v. Shearson/American Express*, 811 F.2d 108, 112-13 (2d Cir.1987). As for implied waiver, in light of the federal policy favoring arbitration, the Second Circuit has noted that “[w]e have often stated that waiver of arbitration is not to be lightly inferred.” *In re Crysenl Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir.2000) (quoting *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 107-08 (2d Cir.1997)). Nonetheless, a party waives its right to arbitration “when it engages in protracted litigation that prejudices the opposing party.” *In re Crysenl/Montenay Energy Co.*, 226 F.3d at 162. Prejudice “refers to the inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” *Id.* at 162-63. The determination must consider “such factors as (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice.” *Id.* at 163. There is no bright-line rule, however, for determining when a party has waived its right to arbitration, and the determination depends on the particular facts of each case. *Id.*

As for who decides waiver, here, this Court may decide the issue. *See Bell v. Cendant Corp.*, 293 F.3d 563, 569 (2d Cir.2002). This case is a FAA § 4 petition to compel, not a motion for stay under § 3; technically, waiver is not a ground for “revocation” of a contract within the

meaning of § 2, and thus not a basis for invalidating an arbitration contract. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 454 (2d Cir.1995). Under § 4, a court is required to grant a petition to compel arbitration “except where a question of fact exists as to (1) the making of the arbitration agreement or (2) the failure, neglect, or refusal of another [i.e., the respondent to the § 4 petition] to arbitrate.” *Id.* (citations and internal quotations omitted). Because waiver of the right to arbitrate does not fall within either of these enumerated categories, a district court cannot ordinarily refuse to order arbitration under § 4 on a theory of waiver. *Id.* An exception exists, however, “where the party invoking arbitration ... was allegedly involved in prior litigation in state courts.” *Id.* at 456; *see Bell*, 293 F.3d at 569 (“However, to prevent forum shopping the district court could properly decide the question when the party seeking arbitration had already participated in litigation *on the dispute.*”) (internal quotation omitted).

II. Application

*5 Applying these principles to the facts of this case, I conclude first that the dispute between the parties is within the scope of the arbitration clause of the Agreement. Second, I conclude that Century has not waived its right to arbitrate. Thus, the motion to dismiss is denied, the petition is granted, and the parties must proceed to arbitration.

A. The Dispute is Within the Scope of the Arbitration Clause

[1] As a preliminary matter, I note that the issue of arbitrability is for this Court to decide. The arbitration clause, construed in accord with New York law, does not provide clear and unmistakable evidence referring the matter of arbitrability to the arbitrator.

[2] Viacom's argument regarding arbitrability is simple. Viacom does not contest the existence or validity of the arbitration clause contained in the settlement agreement. Instead, Viacom insists that there are actually two Century policies numbered CIZ 42 61 97: a 1983 policy and a 1984 renewal of the earlier policy. Viacom contends that the Agreement only applies to the 1983 policy, citing, among other things, the dispute underlying the Agreement, the general practice of renewal in the insurance industry, and the understanding of the parties.

The Court need not reach the merits of this argument, as it is misdirected. Viacom conflates the issue of the scope of the Agreement with the question of the scope of the arbitration clause. The scope of the clause is broad, representing a binding agreement “that any dispute or claim in any way arising out of this Agreement shall be settled by arbitration.” See *ACE Capital Re Overseas Ltd.*, 307 F.3d at 31-32 (discussing similar broad arbitration clauses). Whether the Agreement—which refers to a single policy number—covers only one policy numbered CIZ 42 61 97, or its identically numbered renewal, is a dispute squarely within that clause’s broad scope, and thus a matter that the parties have agreed to settle by arbitration.

Even if I were to assume that Viacom is correct that the Agreement refers to a different Century policy numbered CIZ 42 61 97, this is not enough under the deferential standard that applies to arbitration agreements. It is well settled that “arbitration is indicated unless it can be said ‘with positive assurance’ that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute.” *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir.2002) (citations and internal quotations omitted). As the face of the Agreement refers to a single policy number CIZ 42 61 97, there can be no question that it is “susceptible” to an interpretation that it covers disputes related to other, theoretically distinct policies with the identical number. See *Concourse Vill., Inc. v. Local 32E, SEIU, AFL-CIO*, 822 F.2d 302, 305 (2d Cir.1987) (ordering arbitration despite dispute over whether “superintendents” were covered by underlying agreement, noting “[w]e will order arbitration if the arbitration clause is broad and if the party seeking arbitration has made a claim that on its face is governed by the contract”) (quoting *Associated Brick Mason Contractors of Greater New York v. Harrington*, 820 F.2d 31, 35 (2d Cir.1987)).

B. Century Did Not Waive Its Right to Arbitrate

*6 [3] As discussed above, ordinarily, the defense of waiver brought in opposition to a motion to compel arbitration is a matter to be decided by the arbitrator. See *Bell*, 293 F.3d at 569. This case falls within a narrow exception that exists when the party seeking to compel arbitration has participated in litigation on the same dispute it now seeks to arbitrate. *Id.* Applying the applicable standards to the facts of this case, I conclude that Century did not waive its contractual right to arbitrate, either expressly or by its conduct.

1. Express Waiver

Viacom is correct that if Century expressly waived its right to arbitrate, prejudice need not be shown, and the petition should be dismissed. There is no such waiver here.

Viacom places great weight upon *Gilmore v. Shearson/American Express*, 811 F.2d 108 (2d Cir.1987). This case is not on point. In *Gilmore*, the court found an explicit waiver by the defendant’s “express withdrawal of an earlier motion to compel arbitration [that] waived any contractual right it might have had to compel arbitration of those claims.” 811 F.2d at 109. Not only did the defendant/petitioner in *Gilmore* withdraw its first petition, it actively litigated in the interim before its second. Nothing resembling that case is present here.

Viacom’s argument here rests upon Century’s failure to include the Agreement’s arbitration provision as an affirmative defense, and its certification to the state court that no arbitration was contemplated. These acts do not amount to express waiver. First, Century included in each answer an affirmative defense of prior settlement and release. More importantly, each of Viacom’s successive complaints referred to the 1993 litigation in New York and explicitly asserted no claims against the insurers released by that settlement. On the other hand, the complaint asserted claims under policies issued by Century that were *not* covered by the Agreement. Century thus had no clear need to assert its right to arbitration with respect to the policies covered by the Agreement.

Even accepting the notion that the second amended complaint mistakenly omitted reference to the disputed policy, it was not at all clear—until Viacom obtained leave to file a third amended complaint in late September 2002—that Viacom sought coverage despite its releases. The operative pleading in the case for nearly two years contained no reference to the disputed policy. In this context, no affirmative defense may have been necessary; at the very least, failure to assert the defense does not amount to an express waiver. The same holds true for Century’s certification to the New Jersey court—no arbitration was contemplated because the complaints acknowledged the Agreement and asserted no coverage that would conflict with it.

In any event, the very complexity of the litigation in New Jersey weighs against a finding that Century expressly

waived its right to arbitration. Unlike *Gilmore*, this litigation involves a number of insurers, and, even as to Century itself, a number of different policies are at issue, again, including policies *not* covered by the Agreement. It was not until June 2001 that Viacom forwarded the first of three settlement demands-in five notebooks, with numerous charts and tables-that set out specific coverage demands including the released site (Eagle Mine) and policy number CIZ 42 61 97. (See *Napierkowski Aff.* ¶ 14). By its own account, Viacom itself has had some difficulty managing the information in this complex case, as it asserts it inadvertently omitted a reference to two separate policy numbers in the second amended complaint. In this context, it cannot be said that Century expressly waived its arbitration right.

2. Implied Waiver

*7 [4] In view of all the circumstances, it is likewise clear that Century did not constructively waive its right to arbitrate by “engag[ing] in protracted litigation that prejudice[d] the opposing party.” *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d at 107. This can be seen by considering the relevant factors, including “(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice.” *Id.* at 107-08.

As the New Jersey court noted, notwithstanding that it was first filed in 1999, the extensive state court litigation is still in its early stages. This is because Viacom asked for a stay of formal proceedings to undertake settlement negotiations supervised by the court.

The delay here is not troubling. First, as a technical matter, since January 2001, the released policy was not at issue in state court as it was excluded from the second amended complaint. Second, no substantive motions have been noticed, let alone briefed or decided. Century is not seeking to invoke arbitration in the face of adverse rulings; there have been none. All that has occurred is voluntary, informal discovery.

Viacom's argument for prejudice rests entirely upon this informal exchange of documents, but it is not clear that Viacom produced any documents relevant to the arbitration issue. The voluntary exchange of documents alone does not constitute prejudice. Viacom's submissions on this point are overwrought, accusing Century of acting

in bad faith. (See *e.g.*, Viacom Reply Br. at 9 (“Century knew *exactly* what it was doing when it participated in the informal process without raising the arbitration issue.”; Viacom Br. at 20 (“[W]e now believe Century's failure to mention any contemplated arbitration was intentional.”)). These claims of injury are exaggerated, and in any event do not meet the applicable standard that resolves any doubt as to waiver in favor of requiring arbitration. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

This is not a simple case where one party attempts to take advantage of court-supervised discovery that would be unavailable in a later arbitration. The New Jersey litigation involves claims against 83 carriers beside Century, and it was to all of these carriers that Viacom directed its document production. Viacom would have produced the documents regardless of Century's involvement, and because Century is implicated at other sites, it would have access to the same repository. Further, the dispute covered by the Agreement is a small fraction of the overall litigation; any additional expense Viacom incurred is marginal.

In addition, Viacom argues that Century will cause prejudice to Viacom by seeking a stay of all discovery in the New Jersey action, bringing the entire action to a halt. This argument is now moot, as the New Jersey court's ruling stayed only those claims related to the Agreement. Viacom has failed to show prejudice, and Century has not constructively waived its right to arbitration.

C. Appointment of an Arbitrator

*8 The agreement of the parties does not provide for the selection of an arbitrator. Thus, upon the petition of either party, this Court must do so. See 9 U.S.C. § 5. Here, Century has asked the Court to compel the parties to proceed to arbitration in New York pursuant to the rules of the American Arbitration Association, and to follow that organization's rules for the selection of an arbitrator. This application is granted.

CONCLUSION

The motion to dismiss or stay the petition to compel arbitration is denied, and the petition to compel arbitration is granted. The Clerk of the Court shall enter judgment accordingly, and this case shall be closed.

SO ORDERED.

All Citations

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EXHIBIT 7

2016 WL 67196

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Houston (1st Dist.).

Ifeolumpio O. Sofola M.D., Appellant

v.

Aetna Health, Inc. and Aetna Life
Insurance Company, Appellees

NO. 01-15-00387-CV

|

Opinion issued January 5, 2016

Synopsis

Background: Health care provider sued physician asserting equitable claims. Physician moved to compel arbitration. The 152nd District Court, Harris County, found that he had waived his right to arbitration. Physician appealed.

Holdings: The Court of Appeals, Harvey Brown, J., held that:

[1] physician did not expressly waive his contractual right to arbitrate, and

[2] he did not impliedly waive his contractual right to arbitrate.

Reversed and remanded.

West Headnotes (3)

[1] Alternative Dispute Resolution

— Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,
and Contest

25Tk177 Right to Enforcement and Defenses
in General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Physician did not expressly waive his contractual right to arbitrate breach of contract and fraud claims brought against him by health care provider by removing his arbitration motion during course of agreed motion concerning docket control dates; statement in pleading that physician “intended to withdraw” his motion to compel arbitration followed the representation that the provider had agreed to arbitrate.

Cases that cite this headnote

[2] Alternative Dispute Resolution

— Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,
and Contest

25Tk177 Right to Enforcement and Defenses
in General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Physician did not substantially invoke the litigation process in contravention of his arbitration rights set forth in its contract with health care provider, as would support a conclusion that physician impliedly waived his arbitration rights in contract dispute, even though physician challenged initial equitable claims through a plea to the jurisdiction and also filed a motion for summary judgment; provider had expressly stated that it was presenting equitable claims in an effort to plead around the contractual arbitration provision, and physician had argued that the claims were actually breach of contract claims.

Cases that cite this headnote

[3] Alternative Dispute Resolution

— Suing or participating in suit

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,
and Contest

25Tk177 Right to Enforcement and Defenses
in General

25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Health care provider did not prove it suffered unfair prejudice as a result of physician's litigation conduct in contract dispute, as would support conclusion that physician impliedly waived his contractual right to arbitrate; after initiating its lawsuit, provider spent a year attempting to plead around the arbitration agreement, and when it finally submitted arbitrable claims, physician demanded arbitration within two months.

Cases that cite this headnote

On Appeal from the 152nd District Court, Harris County, Texas, Trial Court Case No. 2013-76814

Attorneys and Law Firms

William L. Van Fleet II, for Ifeolumpio O. Sofola M.D.

John Bruce Shely, Cameron P. Pope, for Aetna Health, Inc. and Aetna Life Insurance Company.

Panel consists of Justices Jennings, Higley, and Brown.

MEMORANDUM OPINION

Harvey Brown, Justice

*1 This is an interlocutory appeal of an order denying arbitration.¹ Dr. Ifeolumpio Sofola moved to compel arbitration of claims filed against him by two Aetna entities for breach of contract and fraud. The trial court found that Dr. Sofola waived his right to arbitration. Dr. Sofola appeals the trial court's order, arguing that he neither expressly nor impliedly waived his right to arbitrate.

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2013) (permitting interlocutory appeal of order denying arbitration).

We reverse.

Background

A. The contractual relationship

Aetna Health, Inc. and Dr. Sofola entered into a Specialist Physician Agreement in March 2009 for Dr. Sofola to become a participating provider of health care services to Aetna's members. The agreement details the parties' various obligations to each other. It contains an arbitration provision that "[a]ny controversy or claim arising out of or relating to this Agreement including breach, termination, or validity of this Agreement, except for temporary, preliminary, or permanent injunctive relief or any other form of equitable relief, shall be settled by binding arbitration."

Another provision of the agreement requires the parties to limit the scope of the arbitration proceeding to claims between themselves and no other parties. It states that "[a]ny arbitration or other proceeding related to a dispute arising under this Agreement shall be conducted solely between them. Neither Party shall request, nor consent to any request, that their dispute be joined or consolidated for any purpose ... with any other proceeding between such Party and any third party."

The agreement also has a specific provision regarding the type of damages that may be sought. Section 9.4 states that "either Party's liability, if any, for damages to the other Party for any cause whatsoever arising out of or related to this Agreement, and regardless of the form of the action, shall be limited to the damaged Party's actual damages." This provision applies regardless of the theory asserted: "Neither Party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever sustained as a result of a breach of this Agreement or any action, inaction, alleged tortious conduct, or delay by the other Party."

B. Aetna sues Dr. Sofola

A couple of years into the contractual relationship, Aetna claimed that Dr. Sofola and other physicians were breaching their agreements and collecting more than their agreed amount of professional fees through a scheme to draw Aetna members to an out-of-network facility in which they held an ownership interest. According to Aetna, the physicians told their Aetna patients that the out-of-network facility would treat them as in-network

patients. This led the patients to agree to receive services at the out-of-network facility. In return, the facility greatly reduced or eliminated the members' copays, removing any financial incentive the patients had to stay in-network.

*2 According to Aetna, the physicians established shell practice entities and entered into secret agreements to receive kickbacks from the out-of-network facility for the referrals. Because Aetna was paying higher facility fees at the out-of-network facility, the arrangement damaged Aetna. Aetna asserts that, to the extent some of the higher facility fees were being funneled to the referring physicians, the conduct violated the provider agreements.

In 2011, Aetna sued Dr. Sofola. The suit was later dismissed. Aetna refiled its suit in late 2013. That petition asserted only equitable claims. Dr. Sofola filed a single responsive pleading in January 2014. The pleading included an answer, plea to the jurisdiction, and special exceptions. He argued that the provider agreement contained a mandatory arbitration provision and that Aetna was impermissibly attempting to plead around that arbitration agreement. He contended that the suit should be dismissed because Aetna did not have standing to assert its "equitable" claims. Dr. Sofola again argued that Aetna was improperly attempting to plead around the arbitration provision in a reply filed in March 2014.

The trial court partially granted Dr. Sofola's plea and dismissed all claims except Aetna's equitable accounting claim. At that point—in March 2014—the equitable accounting claim was the only claim pending against Dr. Sofola, and he had no express contractual right to arbitrate that claim.

In late October 2014, Dr. Sofola filed a motion for summary judgment on the one remaining claim. He argued that an equitable accounting was not available to Aetna because Aetna had an adequate remedy at law through arbitration:

Aetna has an adequate remedy at law, but it is one that Aetna does not like. Aetna may assert a breach of contract claim to recover any damages it claims to have suffered as a result of alleged breaches of its contracts with ... Dr. Sofola. But Aetna does not want to pursue its breach of

contract claims because they are subject to mandatory *confidential* arbitration.... The fact that Aetna does not like its remedy at law cannot and does not erase the fact that one exists, and Aetna cannot demand an equitable accounting just because it does not like the forum for its adequate remedy at law.

Two weeks later, in November 2014, Aetna amended its petition for the first time. The amended petition asserted claims against multiple defendants, not just Dr. Sofola. It asserted various contractual, injunctive, and tort causes of action, in addition to the equitable accounting claim. It sought exemplary damages, not just equitable relief. The first amended petition also informed the trial court that "[i]t is possible that the Doctors and Aetna may agree that some of their dispute will be conducted in a private arbitration."

C. Dr. Sofola moves to compel arbitration

In January 2015—two months after Aetna amended its petition to assert nonequitable claims—Dr. Sofola and his co-defendants filed a motion seeking "dismissal for mandatory arbitration." Dr. Sofola argued that "Aetna's claims are subject to arbitration provisions" but it was pursuing litigation "to intimidate physicians around the nation and prevent them from referring patients to out of network providers." He requested that the trial court dismiss Aetna's claims pursuant to the "undisputed," mandatory arbitration provision. In support, he quoted Aetna's statements made at an earlier hearing, which he viewed as admitting that Aetna's non-equitable claims were subject to mandatory arbitration:

*3 Well, we are allowed to plead around the arbitration provision. The arbitration provision gives us an equitable carve out and that's exactly what we are doing. We are trying to plead within that equitable claim.

Dr. Sofola's arbitration motion was scheduled for hearing on January 23, 2015. Several events occurred before that hearing date.

**D. Surrounding events that
occurred before hearing on motion**

Dr. Sofola filed his motion to dismiss on January 6. Before Aetna responded, it twice sought to amend the docket control dates. The first motion was filed January 9 and sought to extend expert designation deadlines because Aetna had not received notice of the deadlines. Dr. Sofola agreed to the relief Aetna sought: new expert deadlines. The second motion was filed just three days later. It sought to extend other case deadlines for the same reason. Again, Dr. Sofola did not oppose the relief sought.

Aetna filed its response to Dr. Sofola's motion to dismiss on January 21, stating that "Aetna has voluntarily agreed to arbitrate its claims against ... Sofola, [and] arbitration of those claims should be ordered."

The motion was set to be heard on February 20. Three days before the hearing date, on February 17, Dr. Sofola filed a pleading withdrawing the motion. According to that pleading, the withdrawal was "without prejudice" and Dr. Sofola "reserve[d] the right to re-file a Motion to Dismiss in the future, if necessary."

On February 19, Aetna filed another agreed motion to extend deadlines. Aetna's counsel confirmed at oral argument that Aetna prepared the motion and signed it for Dr. Sofola by permission. The pleading noted that the case was one month out from trial, reiterated that Aetna had not received notice of some deadlines in the past, and requested that the trial date be extended

The pleading recounted that Dr. Sofola had moved to compel arbitration, Aetna had "agree[d] to arbitrate its claims," and the motion had been reset "while the Parties attempted to agree on submitting the claims to arbitration."

In addition, the pleading referenced that, three days earlier, on February 16, Dr. Sofola and his co-defendants had "notified Aetna that [they] intended to withdraw their motion and would no longer request that the court compel arbitration."

Finally, the motion confirmed that the parties were not requesting new dates to cause delay.

To summarize the events thus far:

January 6	Dr. Sofola moved to dismiss suit because of the mandatory arbitration provision
January 21	Aetna stated that it has agreed to arbitrate "all of its claims against ... Sofola" but contended that claims against other defendants should continue
February 17	Dr. Sofola withdrew "without prejudice" his motion seeking to dismiss the suit for mandatory arbitration
February 19	In the context of requesting new docket control dates, Aetna acknowledged that it had agreed to arbitrate and that Dr. Sofola withdrew the motion and would no longer request that the Court "compel" arbitration
February 20	Date motion would have been heard if it had not been withdrawn

One week after the new dates were entered, Dr. Sofola filed a counterclaim "subject to the express arbitration provision and request for arbitration pending before this court." In his counterclaim—his third pleading referencing a request for arbitration—Dr. Sofola stated as follows:

*4 Dr. Sofola's counterclaim is expressly filed subject to the arbitration agreement between the parties. Dr. Sofola insists that all matters pending in this litigation,

including this counterclaim, are to be arbitrated.... [Dr. Sofola] insists that the case is being wrongly prosecuted in court and asks that the suit be dismissed and referred to arbitration in its entirety.”

Three days later, Dr. Sofola filed a motion for contractual severance of claims and arbitration. Within the next ten days, Dr. Sofola filed three more pleadings either supplementing evidentiary support for the relief sought or making corrections to the pending motion for arbitration. After these filings, Dr. Sofola had pleaded a right to arbitration in at least seven pleadings.

E. Aetna responds to the motion by arguing waiver

On March 26—the same day that Dr. Sofola filed his last amendment to the arbitration motion—Aetna filed its response. Despite its earlier agreements to arbitrate, Aetna now challenged arbitration, contending that Dr. Sofola had waived his right to arbitration. Specifically, Aetna contended that Dr. Sofola's February 17 notice of withdrawal of his motion to dismiss acted as a judicial admission and estopped him from later seeking arbitration. The trial court held a non-evidentiary hearing.

In April 2015, which was five months after Aetna first added a claim for legal relief (instead of just equitable relief), the trial court denied Dr. Sofola's motion to compel arbitration. The order did not state the basis for the denial, though the only basis Aetna had raised was waiver. Dr. Sofola timely appealed.

Waiver

We must determine whether Dr. Sofola's actions withdrawing his pending arbitration motion, after he submitted multiple pleadings asserting a contractual right to arbitration and Aetna filed pleadings indicating an agreement to arbitrate, either expressly waived or impliedly waived his right to arbitrate. See *G.T. Leach Builders, LLC v. Sapphire VP., LP*, 458 S.W.3d 502, 511–12 (Tex.2015) (explaining express and implied waivers).

“The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent

to relinquish the right or intentional conduct inconsistent with the right.” *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex.2008). Waiver must be intentional. *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex.2007). Waiver may be express or implied. *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex.2008). If implied from a party's conduct, that conduct must be “unequivocal.” *Id.*; see *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 135 (Tex.App.–Houston [1st Dist.] 2003, no pet.); *Haddock v. Quinn*, 287 S.W.3d 158, 177 (Tex.App.–Fort Worth 2009, pet. denied). “Whether waiver occurs depends on the individual facts and circumstances of each case.” *Williams Indus.*, 110 S.W.3d at 135.

A. Standard of review

When the relevant facts are undisputed, whether a party has waived its right to arbitrate is a question of law that we review de novo. *Id.* at 511; see *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex.2014) (per curiam); *Williams Indus.*, 110 S.W.3d at 136 (discussing use of other standards by some courts). “[W]e do not defer to the trial court on questions of law.” *Perry Homes*, 258 S.W.3d at 598.

*5 “There is a strong presumption against waiver of arbitration.” *Perry Homes*, 258 S.W.3d at 584; see *Garcia v. Huerta*, 340 S.W.3d 864, 869 (Tex.App.–San Antonio 2011, pet. denied) (“Once a valid agreement to arbitrate has been established, a presumption attaches favoring arbitration and the burden shifts to the party resisting arbitration to establish a defense to enforcing arbitration.”); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 941 (1983) (discussing United States Arbitration Act and stating that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 574 (Tex.2014) (per curiam) (listing numerous cases in which the Texas Supreme Court has found no waiver). “[C]ourts should resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration.” *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex.2011).

B. Express waiver

Express waiver occurs when a party clearly repudiates or relinquishes its right of arbitration. *G.T. Leach*, 458 S.W.3d at 511 (stating that express waiver occurs through “clear repudiation of the right” to arbitrate). In the context of an arbitration provision, express waiver occurs “when a party affirmatively indicates that it wishes to resolve the case in the judicial forum, rather than through arbitration.” *Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 39 (Tex.App.–Houston [1st Dist.] 2009, pet. denied). “Clear” means “free from doubt” and “sure.” Black’s Law Dictionary 287 (9th ed.2009) (defining clear); *see id.* at 1667 (defining “unequivocal” as unambiguous, clear; free from uncertainty); *cf. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331, 336, 337 n.8 (Tex.2011) (requiring disclaimer of reliance clause to also be “clear and unequivocal”). The waiver must not only be clear, it must be specific. *Moayed v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6 (Tex.2014); *see Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex.1991) (“a waiver provision must state specifically and separately the rights surrendered.”).

Acts that are merely “inconsistent with an intent to exercise the right to arbitrate” are not sufficient to demonstrate an *express* waiver of the right to arbitrate. *G.T. Leach*, 458 S.W.3d at 511. For example, requesting a new trial date might be inconsistent with exercising a right to arbitration, but that inconsistency does not qualify as an express waiver. *Id.*; *see In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 694 (Tex.2008) (“Nothing in this communication expressly waives arbitration or revokes the arbitration demand Fleetwood included in every answer it filed.”).

[1] Aetna makes two arguments for concluding that Dr. Sofola expressly waived his contractual right to arbitrate. First, it argues that the February 19 agreed motion to extend case deadlines contains an express waiver. Second, it argues that, by placing reservation-of-rights language in his February 17 notice, Dr. Sofola limited his ability to reassert a right to arbitrate to situations in which it became “necessary,” which he has not shown to exist.

1. The February 19 pleading does not contain an express waiver

The February 19 agreed motion requested new docket control dates. Requesting a trial date or seeking new

docket control dates does not constitute an express waiver of arbitration rights. *G.T. Leach*, 458 S.W.3d at 511 (holding that, while such actions could be relevant to an implied waiver argument, “they do not constitute an express waiver”). Nonetheless, Aetna argues that Paragraph Three of the motion does qualify as an express waiver. It states as follows:

*6 In the interim, [Dr. Sofola] filed a Motion to Dismiss for Mandatory Arbitration and for Stay. Aetna filed a response, agreeing to arbitrate its claims against doctors. The motion was set for oral hearing on January 23, 2015 and then reset for February 20, 2015, while the Parties attempted to agree on submitting the claims to arbitration. On February 16, 2015, [Dr. Sofola] notified Aetna that [Dr. Sofola] intended to withdraw [his] motion and would no longer request that the Court compel arbitration.

There are at least three problems with Aetna's argument that Paragraph Three is an express waiver—meaning a clear, unequivocal relinquishment of a right to arbitrate. First, while the agreed motion states that Dr. Sofola “intended to withdraw” his motion and would no longer request the court to “compel” arbitration, that statement of intent follows the representation that Aetna had agreed to arbitrate. Such an agreement presumably would render any further need to compel arbitration unnecessary. Aetna's proposed interpretation of the clause—that Dr. Sofola changed his mind and decided against arbitration²—nevertheless remains plausible. However, because the statement admits of two different but reasonable interpretations, we cannot conclude that Paragraph Three is an express, clear, and unequivocal repudiation of the right to arbitration or an affirmative statement that Dr. Sofola wished to resolve the case in the judicial forum, rather than through arbitration. *G.T. Leach*, 458 S.W.3d at 511 (express waiver occurs “through a clear repudiation of the right” to arbitrate); *Ellis*, 337 S.W.3d at 862 (stating that “any doubts” as to waiver of arbitration right should be resolved “in favor of arbitration”).

² Aetna has argued that statements made by Dr. Sofola or his counsel at the time of these events

should be considered. But those statements are not in the record and find no support in the arguments contemporaneously made to the trial court.

Second, neither Paragraph Three nor the remainder of the agreed motion provided a full history of the pleadings relevant to the arbitration issue. Instead, the motion simply explained that there had been “glitches” with the new electronic filing system that caused Aetna to miss deadlines, Dr. Sofola had agreed to extend deadlines as a result,³ and then again, on February 19, Dr. Sofola agreed to extend deadlines once more.⁴ But we should consider the fuller context and the state of the pleadings at that time to determine whether an express waiver occurred. *Cf. Garza v. Villarreal*, 345 S.W.3d 473, 479 (Tex.App.—San Antonio 2011, pet. denied) (court interpreting Rule 11 agreement may consider surrounding circumstances, including state of pleadings, to determine to what parties had agreed).

³ These are the types of agreements that attorneys are encouraged to reach without the necessity of court intervention. *See Texas Lawyer's Creed—A Mandate for Professionalism*, III § 6, 15.

⁴ The deadlines set by the trial court in response to the February 19 agreed motion could have been adopted in a subsequent arbitration order. Indeed, Aetna could have been concerned that an arbitrator would retain the dates unaware that “glitches” caused missed deadlines. Thus, it was in Aetna's interest to move the deadlines even if there was a continuing agreement to arbitrate.

The circumstances that were not included with the “glitches” discussion or fully explained in Paragraph Three were (1) that Aetna had twice agreed to arbitrate against Dr. Sofola but did not agree to arbitrate against the other defendants, (2) the complexity surrounding how the parties would divide the litigation between arbitrable claims and parties and those that would remain in litigation,⁵ and (3) that Dr. Sofola was no longer asking the court to “compel” arbitration but all the while reserved his right to demand arbitration if court intervention became “necessary.”⁶

⁵ The court order that resulted from Dr. Sofola's arbitration motion could have addressed more than simply whether the contract claims against Dr. Sofola should be arbitrated. It could have addressed the unarbitrable claims for equitable relief and the claims

against third parties, as well as the issue of the recovery of certain types of damages. Thus, an agreement to arbitrate, in this case, was not as simple as two parties agreeing that all claims between them should be arbitrated.

⁶ At the hearing on the waiver issue, none of the parties emphasized Aetna's express agreement to arbitration in two prior pleadings or the context of the earlier withdrawal of the arbitration motion. But these two pleadings and this context support our conclusion that Dr. Sofola did not intentionally or clearly repudiate his right to arbitration, expressly or unequivocally relinquish that right, or affirmatively state that he wished to resolve the case in the judicial forum. *See G.T. Leach*, 458 S.W.3d at 511; *Okorafor*, 295 S.W.3d at 39.

*7 Third, Aetna confirmed at oral argument that it drafted the February 19 document that it now argues is an express waiver by its party-opponent. Given Aetna's role as drafter, an effective waiver would need to be much more straightforward than what we are presented with here. To accept Aetna's reading of the pleadings, we would have to resolve doubt against arbitration and imply a motivation on Dr. Sofola that the surrounding circumstances do not support. Because of the clarity requirement for an express waiver, this we cannot do. *See G.T. Leach*, 458 S.W.3d at 511; *Ellis*, 337 S.W.3d at 862.

Aetna relies on *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir.1987), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), to argue that the act of withdrawing a motion for arbitration waives the right to arbitrate and becomes binding on the pleader such that he cannot later take an inconsistent position in the litigation. But *Gilmore* is distinguishable because the party that previously withdrew its arbitration motion, in that case, agreed that the withdrawal was an express waiver and “conceded” that the effect of the withdrawal was that it could no longer pursue arbitration without a significant, intervening event. *Id.* at 112. Dr. Sofola makes no such concession here. He has steadfastly maintained that he was not waiving his contractual right to arbitrate.

2. The February 17 “if necessary” language does not prohibit dismissal

Because Dr. Sofola's withdrawal motion stated that it was without prejudice and that he reserved the right to reassert his motion “if necessary,” Aetna's second argument hinges

on the extent that limitation placed on Dr. Sofola's ability to pursue post-withdrawal arbitration. Aetna argues that this phrase limited Dr. Sofola's opportunity to re-urge his right to arbitration to situations in which arbitration became "absolutely essential," which Dr. Sofola has not shown to exist.

But there is another, more plausible reading of this language: Dr. Sofola was removing the issue from the court's consideration given that the parties had reached an agreement to arbitrate, but he would re-urge his motion if the parties could not agree on the form of the dismissal order.⁷ Consistent with this interpretation, the parties filed a pleading, just two days later, stating that "Aetna [has] filed a response, agreeing to arbitrate its claims...." Thus, we conclude that Dr. Sofola did not waive his right to arbitration through this February 17 pleading either.

⁷ See footnote 5, *supra*.

Throughout this case, Dr. Sofola consistently maintained that Aetna was making breach-of-contract claims, that Aetna was attempting to recast them as equitable claims to avoid arbitration, and that he had a contractual right to compel arbitration. Dr. Sofola only removed his arbitration motion from consideration after Aetna agreed in a pleading to arbitrate its claims against Dr. Sofola and the parties informed the court that they were using the time during which the issue was being passed to "agree" on the terms of the submission to arbitration. We conclude that Dr. Sofola did not expressly waive his right to arbitration during the course of these events. Having rejected Aetna's express-waiver argument, we turn to its contention that Dr. Sofola impliedly waived that right.

C. Implied waiver

"A party asserting implied waiver as a defense to arbitration has the burden to prove that (1) the other party has 'substantially invoked the judicial process,' which is conduct inconsistent with a claimed right to compel arbitration, and (2) the inconsistent conduct has caused it to suffer detriment or prejudice." *G.T. Leach*, 458 S.W.3d at 511–12; *Perry Homes*, 258 S.W.3d at 593–94. Prejudice is "inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Perry Homes*, 258 S.W.3d at 597; *Kennedy Hodges*, 433 S.W.3d at 545.

*8 With regard to both prongs of the implied-waiver defense, "this hurdle is a high one" because "the law favors and encourages arbitration." *G.T. Leach*, 458 S.W.3d at 512 (quoting *Perry Homes*, 258 S.W.3d at 589–90); see *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex.2014) (per curiam). The party asserting implied waiver bears a "heavy burden of proof," and the court must resolve all doubts in favor of arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (Tex.1998); *USX Corp. v. West*, 759 S.W.2d 764, 767 (Tex.App.–Houston [1st Dist.] 1988, no writ).

Implied waiver is decided on a case-by-case basis by assessing the "totality of the circumstances." *Kennedy Hodges*, 433 S.W.3d at 545. We consider such factors as (1) how long the party moving to compel arbitration waited to do so; (2) the reasons for the movant's delay; (3) whether and when the movant knew of the arbitration agreement during the period of delay; (4) how much discovery the movant conducted before moving to compel arbitration and whether that discovery related to the merits; (5) whether the movant requested the court to dispose of claims on the merits; (6) whether the movant asserted affirmative claims for relief in court; (7) the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction); (8) the amount of time and expense the parties have committed to the litigation; (9) whether the discovery conducted would be unavailable or useful in arbitration; (10) whether activity in court would be duplicated in arbitration; and (11) when the case was to be tried. *G.T. Leach*, 458 S.W.3d at 512; *Perry Homes*, 258 S.W.3d at 590–91; *Kennedy Hodges*, 433 S.W.3d at 545.

1. Substantially invoking judicial process

[2] Aetna argues that Dr. Sofola took actions during the pendency of the litigation that substantially invoked the judicial process. The first act on which Aetna relies is Dr. Sofola's decision to challenge Aetna's equitable claims through a plea to the jurisdiction instead of a motion to compel arbitration. Aetna's original petition asserted equitable claims only. Aetna expressly stated that it was presenting equitable claims in an effort to plead around the contractual arbitration provision. Dr. Sofola argued that the claims were actually breach of contract claims. His plea to the jurisdiction based on arguments consistent with the arbitration provision effectively challenged those claims and resulted in all but one being dismissed. We do

not agree that Dr. Sofola substantially invoked the judicial process by asserting a plea to the jurisdiction.

Next, Aetna cites Dr. Sofola's summary-judgment motion and counterclaim. Dr. Sofola moved for summary judgment on the only Aetna claim that survived the plea to the jurisdiction. In that pleading, Dr. Sofola again asserted that Aetna's true claim was a breach-of-contract claim and that Aetna was seeking an equitable accounting only to avoid the confidential arbitration provision that applied. Dr. Sofola's subsequent counterclaim was filed "expressly and unconditionally subject to and insisting upon compliance with the arbitration provision between the parties." The title of the pleading stated that it was "filed subject to the express arbitration provision and request for arbitration pending before this court." We do not view either of these pleadings as substantially invoking the judicial process.

*9 Next, Aetna argues that Dr. Sofola's notice of withdrawal of his arbitration motion acted as a waiver. We have already concluded that the notice, when considered in the context of the parties' other pleadings and in light of the surrounding circumstances, equally could be viewed as passing the hearing because the parties had agreed to arbitrate. Because the record does not support the conclusion that Dr. Sofola withdrew his motion to elect litigation and in light of the strong presumption against waiver of the right to arbitrate, we conclude that the withdrawal does not represent a substantial invocation of the judicial process. *See Williams Indus.*, 110 S.W.3d at 135.

Finally, both times that Dr. Sofola executed agreed motions to extend deadlines, those documents plainly stated that the requests were being made because Aetna had been disadvantaged by missing deadlines. Dr. Sofola acquiesced to Aetna's request for new deadlines. Doing so does not equate to a deliberate act inconsistent with the right to arbitrate. *See id.*

2. Evidence of prejudice

[3] To show prejudice through delay, Aetna focuses on the fact that Dr. Sofola first moved to compel arbitration "13 months after suit was filed by Aetna." At the hearing on the motion to compel arbitration, Aetna argued, "if Dr. Sofola wanted to go to arbitration, he should have filed that Motion Day One. He should have been in arbitration from Day One and avoiding all of this unnecessary

expense in this case." But during the first 11 months of the lawsuit, Aetna sought only equitable relief—which was not subject to arbitration—specifically noting that it was exercising its right to plead within the "equitable carve out" that the arbitration provision provided. The time period during which Aetna was asserting only equitable claims does not count against Dr. Sofola as a period of delay in seeking arbitration.

Removing those eleven months from our analysis, we see that Aetna first asserted its non-equitable claims in November 2014. Dr. Sofola moved for dismissal, specifically citing the arbitration clause, two months later. This is not a lengthy delay. Regardless, "while the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine" whether a waiver has occurred. *In re Universal Underwriters*, 345 S.W.3d 404, 408 (Tex.2011). Instead, a court must examine "the circumstances and the parties' conduct, not merely a measure of the amount of time involved" preceding the alleged waiver. *Id.* Because the parties, through their pleadings, were seemingly agreeing to arbitrate but continuing to negotiate aspects of that agreement, a two month delay does not appear unreasonable.

Finally, Aetna argues that the "time and expense that Aetna has incurred because of Sofola's actions is obvious from the fact of the record." However, the timeline of events does not support that contention. Aetna presents no evidence that Dr. Sofola engaged in any discovery or otherwise affirmatively sought relief in the judicial forum during the period before he sought to compel arbitration. Nor does Aetna present any evidence that it spent much time or money on the merits of its arbitrable claims.

After initiating its lawsuit, Aetna spent much of the next year attempting to plead around the arbitration agreement. When Aetna finally clearly asserted arbitrable claims, Dr. Sofola demanded arbitration within two months and was denied that right within four. In light of the significant amount of time Aetna spent defending its "carve out" pleading approach and Dr. Sofola spent demanding or preserving his contractual right to arbitrate, we do not view the record as supporting Aetna's contention that it endured expense and delay as a result of Dr. Sofola's flip-flop tactics versus its own trial strategy. The record does not support Aetna's statement to the contrary.

*10 In sum, Aetna's petition seeking legal relief subject to the arbitration clause (not just equitable relief) had been on file only four and one-half months when the trial court rejected Dr. Sofola's arbitration motion based on Aetna's waiver defense. During that time, Dr. Sofola filed at least five pleadings asserting a right to arbitration, and Aetna filed at least two pleadings evidencing an agreement to arbitration. We conclude that Aetna has not established the requirements for holding that Dr. Sofola impliedly waived his right to arbitration during these events.

Conclusion

Because Dr. Sofola neither expressly nor impliedly waived his right to arbitration, we conclude that the trial court erred by denying his motion. We reach this conclusion

by considering the language in the agreed motion on which Aetna bases its waiver argument—language that was drafted by Aetna—as well as the surrounding circumstances and pleadings, including Aetna's two statements that it was agreeing to arbitrate and that the hearing that was approaching when those statements were made.

Aetna offered no basis for denying Dr. Sofola's motion other than waiver; therefore, having concluded that the waiver argument was without merit, we reverse the trial court's order denying the motion and instruct the trial court to grant the motion as to all non-equitable claims.

All Citations

Not Reported in S.W.3d, 2016 WL 67196

EXHIBIT 8

2008 WL 5068935

Only the Westlaw citation is currently available.
 United States District Court,
 D. Arizona.

MARLYN NUTRACEUTICALS, INC.,
 an Arizona corporation, Plaintiff,

v.

IMPROVITA HEALTH PRODUCTS,
 INC., an Ohio corporation, Thomas
 Klamet, and Daniel Kohler, Defendants.

No. CV 08-1798-PHX-MHM.

|
 Nov. 25, 2008.

West KeySummary

1 Alternative Dispute Resolution

— Waiver or Estoppel

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk177 Right to Enforcement and Defenses in General

25Tk182 Waiver or Estoppel

25Tk182(1) In general

A purchaser did not waive its right to arbitration under an arbitration agreement contained in a manufacturing and supply agreement with a nutritional products supplier where the purchaser's alleged improper conduct did not clearly repudiate the arbitration agreement. Although the purchaser cancelled arbitration twice for ambiguous reasons, the purchaser did offer to reschedule the arbitration, resulting in a delay of only one month.

Cases that cite this headnote

Attorneys and Law Firms

Neal Hait Bookspan, Jaburg & Wilk PC, Phoenix, AZ, for Plaintiff.

Donald L. Myles, Jr., Thomas Robert Nolasco, Jones Skelton & Hochuli PLC, Phoenix, AZ, for Defendants.

ORDER

MARY H. MURGUIA, District Judge.

*1 Currently before the Court are Defendants Improvita Health Products, Inc. ("Improvita"), Thomas Klamet ("Klamet"), and Daniel Kohler's ("Kohler") Motion to Dismiss Plaintiff Marlyn Nutraceuticals, Inc.'s ("MNI") Complaint pursuant to Rules 12(b) (1)(2)(3) and (6) of the Federal Rules of Civil Procedure Rules. (Dkt.# 7). Also before the Court is Plaintiff's Motion for Expedited Hearing on Defendants' Motion to Dismiss. (Dkt.# 12). After reviewing the pleadings and determining that oral argument is unnecessary, the Court issues the following order.

I. BACKGROUND

On May 15, 2007, Plaintiff MNI and Defendant Improvita entered into a Manufacturing and Supply Agreement (the "Agreement") pursuant to which MNI would manufacture and supply nutritional products and supplements to Improvita. (Dkt.# 1, ¶ 10). The Agreement provides that all disputes must be resolved through an arbitration process pursuant to Article XVIII, entitled "Dispute Resolution." (Dkt.# 1, Ex. B).

The Agreement provides that Improvita will pay MNI for all finished product or work in process, and all unused ingredients that can not be returned. (Dkt. # 11, ¶ 11). Improvita fell behind on payments; from approximately October 2007 through late February 2008, MNI attempted to work with Improvita with respect to its delinquent debts. (*Id.*, ¶ 14). On February 29, 2008, due to Improvita's failure to pay down its debts and alleged attempt to delay resolving the payment issues, MNI initiated negotiation proceedings pursuant to the Agreement's notice provision in Article XVIII. (*Id.*, ¶ 19). MNI's February 29, 2008 notice demanded that Improvita agree to formally mediate the payment dispute on or before the close of business on March 5, 2008. (*Id.*, ¶

21). MNI also provided names of potential mediators in Phoenix, Arizona, and approximately eight possible dates on which the parties could mediate. (*Id.*). Improvita failed to respond to MNI's request until March 4, 2008. (*Id.*, ¶ 20, Ex. C).

Having made no progress through alternative dispute resolution, MNI filed a Complaint against Improvita in Maricopa County Superior Court on March 20, 2008. (Dkt.# 11, ¶ 23). Improvita subsequently filed a Motion to Dismiss, arguing that the dispute must be resolved through mediation or arbitration based on the alternative dispute resolution provision in the May 15, 2007 Agreement. (*Id.*). MNI did not file a responsive memorandum to Defendants' Motion to Dismiss, and the Superior Court dismissed the case. (*Id.*, ¶ 24).

On May 19, 2008, MNI and Improvita submitted to a mediation in Phoenix, Arizona. (Dkt.# 11, ¶ 24). In preparation for the mediation, MNI submitted a 13 page Mediation Memorandum, including 25 exhibits; Improvita made no settlement offers and raised its alleged defenses less than one week prior to the mediation. (*Id.*, ¶ 25). Improvita did not provide supporting documentation. (*Id.*, ¶ 28). Although the mediation was unsuccessful, the parties attempted to schedule an arbitration. (*Id.*, ¶ 25). Based on correspondence between the parties' counsel, an arbitration was scheduled for August 19, 2008, before Steve Scott in Phoenix, Arizona. (*Id.*, ¶ 26). However, one week after arbitration was scheduled, Improvita informed MNI that due to a scheduling conflict, the arbitration could not take place before August 26, 2008. (*Id.*, ¶ 27). The parties rescheduled the arbitration for August 27, 2008, to take place before Daniel Nastro. (*Id.*, ¶ 29). The parties also agreed on a disclosure statement date for discovery and relevant arbitration issues; Improvita confirmed the August 27, 2008 arbitration date in a letter dated July 1, 2008. (*Id.*). But on August 14, 2008, Improvita announced that it would not participate in the scheduled arbitration because of the "associated expenses"; it proceeded to cancel the arbitration and offered to reschedule one after October 1, 2008. (*Id.*, ¶ 30).

*2 Instead, on August 22, 2008, MNI filed a Complaint against Improvita and Defendants Klamet and Kohler for breach of contract, viewing Improvita's cancellation of the arbitration as an act of bad faith and an attempt to further delay resolution. (Dkt.# 1). Defendants filed the

instant Motion to Dismiss on October 6, 2008, and request dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1)(2)(3) and (6). (Dkt.# 7). Defendants contend that dismissal is appropriate because the May 2007 Agreement between the parties provides that they must comply with a two-step resolution process (mediation and then arbitration) in lieu of litigation. (*Id.*). Plaintiff, on the other hand, argues that (1) Defendants' Motion to Dismiss is procedurally improper, (2) Defendants Klamet and Kohler are not parties to the Agreement, and therefore, do not have a right to demand arbitration, and (3) Defendant Improvita waived its right to enforce the arbitration provision by its improper conduct. (Dkt.# 8). Plaintiff also filed a Motion to Expedite Hearing.¹ (Dkt.# 12).

¹ Having ruled on Defendants' Motion to Dismiss in this Order (see below), and having determined that oral argument is unnecessary, the Court will deny Plaintiff's Motion for Expedited Hearing as moot.

II. STANDARD OF REVIEW

Rule 12(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

"Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) a lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted"

Fed.R.Civ.P. 12(b). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.1997). When reviewing a motion to dismiss, the Court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir.1990). The Court must draw all reasonable inferences in favor of the non-moving party. *Salim v. Lee*, 202 F.Supp.2d 1122, 1125 (C.D.Cal.2002). Dismissal is proper "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief.” *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986).

An inquiry into the adequacy of the evidence is improper when deciding whether to dismiss a complaint for failure to state a claim. *Enesco Corp. v. PricelCostco, Inc.*, 146 F.3d 1083, 1085 (9th Cir.1998). In addition, when deciding a motion to dismiss for failure to state a claim, courts may not consider facts and evidence outside the complaint. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.2001) (citation omitted) (a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion). However, a district court may consider material that is properly submitted as part of the complaint, as well as documents that are not physically attached to the complaint, as long as their authenticity is not contested and the complaint necessarily relies on them.² *Id.* at 688.

² As such, to the extent that Plaintiff contends that Defendants' Motion to Dismiss is procedurally improper because it cites to and quotes the parties' May 2007 Agreement, Plaintiff is incorrect. The authenticity of the Agreement is not contested; Plaintiff does not contend that its Complaint does rely on the Agreement.

III. DISCUSSION

A. Waiver of Right to Arbitration

*3 Plaintiff contends that Defendant Improvita has waived its right to enforce the arbitration agreement through its improper conduct, namely, refusing to participate in good faith during mediation and allegedly delaying the resolution process. (Dkt.# 8). Defendants argue that the right to arbitrate was never waived because Defendants never clearly repudiated the right to enforce the arbitration agreement. (Dkt.# 11).

“It is well-established ... that a party to a contract may waive its right to enforce an arbitration agreement by its conduct. Waiver occurs when a party relinquishes a known right or exhibits conduct that clearly warrants inference of an intentional relinquishment.” *Meineke v. Twin City Fire Insur. Co.*, 181 Ariz. 576, 581, 892 P.2d 1365 (1994) (citations omitted). There are three elements that support a finding of waiver of a right to arbitration: (1) a party was aware of its right to arbitration, (2) acted in a manner inconsistent with the exercise of that right, and (3) prejudiced the opposing party as a result.

Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir.1986). “Inconsistency usually is found when one party engages in conduct preventing arbitration, proceeds at all times in disregard of arbitration, expressly agrees to waive arbitration, or unreasonably delays requesting arbitration.” *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 190–91, 877 P.2d 284 (1994) (footnote omitted) (citation omitted).

Here, although Defendants' conduct could be construed as attempting to prevent arbitration, the Court is unconvinced at this time that Defendants *clearly* repudiated the Agreement. *See Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266, 1274 (D.Ariz.2007) (stating that repudiation should not be inferred unless it is clear). Although Improvita cancelled arbitration twice (and for ambiguous reasons), they did offer to reschedule the August 27th arbitration to October 1st, a delay of only one month. The Court cannot, without more, hold that that request was unreasonable. As such, the Court is hesitant to infer a repudiation to enforce the arbitration agreement at this time. Accordingly, the Court finds that Defendant Improvita has not waived its right to arbitration, and thus dismissal without prejudice is appropriate.

B. The Individual Defendants

Plaintiff contends in its Response to Defendants' Motion to Dismiss that its Complaint, which alleges misrepresentation and fraud against Improvita, as well as Klamet and Kohler (the “Individual Defendants”), may not be dismissed against Individual Defendants Klamet and Kohler based on a demand for arbitration because they are not parties to the May 2007 Agreement. However, Defendants, in their Reply, essentially argue that Plaintiff fails to state a claim against the Individual Defendants because the allegations “arise from the exact same facts as the claims against the corporate Defendant Improvita.”³ Defendants do not dispute that the Individual Defendants are not parties to the May 2007 Manufacturing and Supply Agreement.

³ Defendants also argue that the arbitration provision in the May 2007 Agreement expressly provides that all disputes arising out of or related to the Agreement must be resolved by arbitration, and thus it would be inefficient to require the Individual Defendants

to defend themselves in this case while Defendant Improvita proceeded to arbitration.

*4 Although Individual Defendants Klamet and Kohler are not parties to the Agreement, and thus are not entitled to demand arbitration, the Court notes that the claims asserted in the Complaint against the Individual Defendants are indistinguishable from the allegations made against Defendant Improvita. In addition, having reviewed the Complaint, it appears that Plaintiff does not allege that the Individual Defendants acted in their individual capacities when making representations to Plaintiff on behalf of Improvita. Further, the Individual Defendants contend that they are "senior management" of Improvita who are required under the Agreement to engaged directly in the dispute resolution process (Dkt.# 11, p. 3); the Court notes that "arbitration clauses should be liberally construed, and doubts regarding arbitrability should be resolved in favor of arbitration." *See Foy v. Thorp*, 186 Ariz. 151, 153, 920 P.2d 31 (App.1996). As such, the Court finds no basis on which to retain this case against only the Individual Defendants.

However, the Court recognizes Plaintiff's stated frustration with respect to Defendants' conduct and is aware that continued rescheduling of arbitration will delay resolution of the parties' dispute. As such, the Court will infer that any further, substantially unjustified delay by Defendants in submitting to arbitration will

constitute waiver of Defendants' right to enforce the parties' arbitration agreement. Further, should arbitration not occur by the date specified below, the Court will allow Plaintiff to file a motion to re-open this case.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (Dkt.# 7) is GRANTED. The case is dismissed without prejudice.

IT IS FURTHER ORDERED that Plaintiff's Motion for Expedited Hearing (Dkt.# 12) is DENIED as moot.

IT IS FURTHER ORDERED that the parties must submit to arbitration no later than *December 23, 2008*. If arbitration does not occur within the specified time, the Court will permit Plaintiff to file a motion to re-open the case.

IT IS FURTHER ORDERED directing the Clerk of the Court to enter Judgement accordingly.

DATED this 24th day of November, 2008.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5068935

EXHIBIT 9

STATE OF MICHIGAN
COURT OF APPEALS

REVAN FRANCIS and PRESTIGE MEDICAL
BILLING SERVICES, INC.,

UNPUBLISHED
May 3, 2016

Plaintiffs/Counter-Defendants-
Appellees,

v

CANDICE KAYAL,

Defendant/Counter-Plaintiff-
Appellant.

No. 325576
Wayne Circuit Court
LC No. 13-001557-CB

Before: O'CONNELL, P.J., AND MARKEY AND O'BRIEN, JJ.

PER CURIAM.

Defendant/counter-plaintiff, Candice Kayal (defendant), appeals by right the trial court's order compelling defendant and plaintiffs/counter-defendants, Revan Francis and Prestige Medical Billing Services, Inc. (plaintiffs), to arbitration and setting aside the default entry. We affirm.

This case arises from a business dispute between two family friends. In November of 2012, defendant and plaintiff Francis entered into a partnership agreement in which they set up the operation of a medical billing business. But the partnership relationship soured soon thereafter, and plaintiffs took legal action against defendant on January 31, 2013. Plaintiffs filed a complaint alleging that defendant breached her fiduciary duty to the partnership. Plaintiffs sought dissolution of the partnership, an accounting of partnership property, partition of partnership property, and an injunction to preclude defendant from further operating the business. Defendant answered and filed a counter-complaint asserting the same exact allegations and claims. After plaintiffs failed to answer defendant's counter-complaint, defendant moved for entry of a default. Defendant filed a "Default Request, Affidavit, and Entry" form, but the section of the form titled "Default Entry" remained blank. Plaintiffs subsequently moved the trial court to set aside the default and to order the parties into arbitration, as the partnership agreement between the parties contained an arbitration clause. The trial court agreed and ordered the default to be set aside and the parties to enter into arbitration.

On appeal, defendant first argues that the trial court abused its discretion in setting aside a validly-entered default because plaintiffs did not prove the required good cause and meritorious defense elements necessary to set aside a default.

We review a trial court's decision on a motion to set aside a default for an abuse of discretion. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Ypsilanti Charter Tp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008). A court necessarily abuses its discretion when it makes an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

MCR 2.603(D)(1) provides:

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

"Good cause" may be shown by: "(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand." *Shawl*, 280 Mich App at 221 (citations and quotation marks omitted). Furthermore, to determine whether a meritorious defense has been presented, a trial court should consider whether: "(1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement; (2) a ground for summary disposition exists . . . or (3) the plaintiff's claim rests on evidence that is inadmissible." *Id.* at 238. The burden of proving these two prongs is placed on the party seeking to set aside the default. *Saffian v Simmons*, 477 Mich 8, 15; 727 NW2d 132 (2007).

If a valid default were entered here, we might agree with defendant that the trial court abused its discretion in setting it aside. But MCR 2.603(A)(1) requires that the court clerk "...must enter the default..." and (2) further requires that the entered default be served on all parties. The facts show that the default was never entered as required by MCR 2.603. The "Default Entry" section of the "Default Request, Affidavit, and Entry" form is blank. This indicates that the court clerk never signed or dated the document. Moreover, the register of actions associated with this case does not show that a default was actually entered. The only entry pertaining to a default is one from April 22, 2013, which merely states, "Default, Request, Affidavit and Entry Filed." Apparently, once the court received defendant's SCAO Default Requests form, it was simply recorded as received. That is, the clerk did not follow up by properly entering it; that portion of the form is blank. It simply languished, nor did defendants themselves follow through with having it entered and served as required. Accordingly, we conclude that the trial court abused its discretion in setting aside a default that never existed and in doing so made a decision that falls outside the range of reasonable and principled outcomes. See *Kircher*, 281 Mich App at 273.

Although the trial court abused its discretion, reversal on this ground is not necessary. We will not reverse a lower court decision on the basis of a harmless error. MCR 2.613(A);

Natural Resources Defense Council v Dept of Environmental Quality, 300 Mich App 79, 89; 832 NW2d 288 (2013). MCR 2.613(A) provides the following:

Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

The trial court's error is not inconsistent with substantial justice because the decision does not affect defendant's position. She is not entitled to this Court's reinstating a default that never legally existed. Thus, defendant is returned to her original position.

Next, defendant argues that plaintiffs waived their right to arbitration, and, accordingly, the trial court committed error in compelling the parties to arbitrate. Although we acknowledge plaintiffs' inconsistent actions, we disagree.

The existence and enforceability of an arbitration agreement are questions of law we review de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). Whether the relevant circumstances establish a waiver of the right to arbitration is also reviewed ne novo. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). Additionally, we review "for clear error the trial court's factual determinations regarding the applicable circumstances." *Id.*, citing MCR 2.613(C). A finding is clearly erroneous when, on review of the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

The waiver of a contractual right to arbitration is disfavored. *Madison Dist Pub Sch*, 247 Mich App at 588. "The party arguing there has been a waiver of this right bears a heavy burden of proof and must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id.* (citations and quotation marks omitted). A waiver of the right to arbitration may be express or implied. This Court, after looking to other jurisdictions, has offered the following guidance as to whether waiver has occurred:

It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a [party] waives the right to arbitration of the dispute involved. A waiver of the right to [arbitration] . . . has also been found from particular acts of participation by a [party], each act being considered independently as constituting a waiver. Thus, a [party] has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim . . . without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for

summary judgment, or utilizing judicial discovery procedures. [*Id.* at 589 (citations and quotation marks omitted).]

“A party does not waive the right to arbitrate . . . by litigating an issue that is not arbitrable.” *Id.*

Defendant cannot prove waiver here because she has failed to show that she was prejudiced by plaintiffs’ inconsistent actions. Although the first two prongs—that plaintiffs knew of their right to arbitration and that they acted inconsistently with the right—may be satisfied, defendant cannot show that she was prejudiced. This Court has found prejudice where the plaintiff initiated a lawsuit against a defendant, and the defendant litigated the issue for 1½ years, only to have the plaintiff seek arbitration after all the time spent litigating in trial court. *Madison Dist Pub Sch*, 247 Mich App at 599-600. Here, plaintiffs sought arbitration a mere five months following the initiation of their lawsuit—the complaint was filed on January 31, 2013, and the motion to compel arbitration was filed on May 15, 2013. Moreover, the trial court ordered plaintiffs’ attorney to pay \$1,000 in attorney’s fees to defendant’s attorney for filing a complaint instead of starting with arbitration and for having to litigate the setting aside of the default. Defendant was not prejudiced. She did not expend a great deal of time and money on trial court litigation. She was, in fact, compensated for the five months spent in litigation, even though the litigation pertained to a matter that arguably resulted in part from defendants’ own mistake or oversight. (Not noting that the Default did not comply with MCR 2.603 before trying to enforce it.) Accordingly, defendant is unable to show that plaintiffs waived their right to arbitration because she cannot prove that she was prejudiced by plaintiffs’ actions.

We affirm. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Colleen A. O'Brien

EXHIBIT 10

STATE OF MICHIGAN
COURT OF APPEALS

VICKI LYNN PHILLIPS,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

WOLGAST RESTORATION,

Defendant-Appellee,

and

DESHANO CONSTRUCTION,

Defendant/Cross-Defendant-
Appellee,

and

CHASE MANHATTAN BANK USA, doing
business as CHASE HOME FINANCE, LLC,

Defendant.

UNPUBLISHED
November 17, 2016

No. 328309
Gladwin Circuit Court
LC No. 13-007228-CK

VICKI LYNN PHILLIPS,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant/Cross-Plaintiff,

No. 329740
Gladwin Circuit Court
LC No. 13-007228-CK

and

WOLGAST RESTORATION,

Defendant-Appellee,

and

DESHANO CONSTRUCTION,

Defendant/Cross-Defendant,

and

CHASE MANHATTAN BANK, USA, doing
business as CHASE HOME FINANCE, LLC,

Defendant.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

In these consolidated appeals, in Docket No. 328309, plaintiff, Vicki Lynn Phillips, appeals as of right the trial court's order dismissing defendant DeShano Construction under MCR 2.116(C)(7) on the basis of the parties' arbitration agreement. In Docket No. 329740, Phillips appeals as of right the trial court's judgment awarding offer of judgment attorney fees and costs to defendant Wolgast Restoration. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

DeShano originally built Phillips's home and sold it to Philips in 2005. At the time of the sale, Phillips and DeShano entered into a limited warranty agreement to cover construction defects, including major structural defects. The agreement provided that unresolved disputes between the parties would be resolved in binding arbitration.

In May 2013, a storm damaged Phillip's home. Phillips had insured the home through State Farm Insurance Company, who advised Phillips to find someone to do the repairs. Phillips hired Wolgast to repair the home. State Farm made an initial payment of \$50,000 into an escrow account at Chase Bank, which held a mortgage on the home, and Chase Bank issued a check to Wolgast for approximately \$16,600 to begin repairs. Wolgast hired Paragon Forensics to perform a thorough engineering assessment, and Paragon's report suggested that much of the damage to the home was "precipitated by numerous construction defects" and that "had the home been properly built, it is unlikely that any significant damage would have occurred."

Wolgast sent Paragon's report to State Farm, which questioned its obligation to provide coverage in light of the house's substandard construction. Given the uncertainty, Wolgast stopped making repairs. Wolgast's employee, Mike Bellor, testified at trial that Wolgast had earned all but approximately \$3,800 of the initial \$16,600 payment at the time it stopped repairs.

In December 2013, Phillips filed a complaint against State Farm, Wolgast, DeShano, and Chase Bank. Plaintiff alleged that State Farm had breached its obligations under the insurance policy, that Wolgast breached its duty by sharing Paragon's report with State Farm, that Wolgast and State Farm had engaged in fraudulent conduct, that DeShano breached its duties by failing to disclose defects in the home, and that she was entitled to the funds escrowed at Chase Bank.

In its answer to Phillips's complaint, DeShano raised the arbitration clause as an affirmative defense. Wolgast presented Phillips with an offer of judgment to settle the case for \$500. Phillips did not respond, effectively rejecting the offer. A case evaluation panel issued a non-unanimous award in November 2014 that recommended that Phillips receive \$25,000 from State Farm, \$15,000 from Wolgast, and \$10,000 from DeShano. Wolgast accepted the award; Phillips rejected it.

Shortly before trial, DeShano filed its motion for summary disposition on the basis of the arbitration clause. The trial court found that DeShano had not waived its rights but had remained in the litigation to make good-faith efforts to settle the case. It dismissed Phillips's claims against DeShano for arbitration.

Phillips's claims against Wolgast and State Farm proceeded to trial, during which Wolgast's counsel gave plaintiff a check for approximately \$3,800, representing the amount that Bellor admitted Wolgast had not earned. Ultimately, the jury attributed 50% responsibility to DeShano and 50% to Phillips, and it found that neither State Farm nor Wolgast had acted wrongfully or breached material elements of their contracts. The trial court entered a judgment of no cause of action.

Following judgment, Wolgast moved for offer of judgment sanctions. The trial court granted the motion, finding that the no cause of action verdict was more favorable to Wolgast than its \$500 offer of judgment. The trial court awarded Wolgast \$2,482.15 in costs and \$51,497.50 in attorney fees.

II. ARBITRATION DISMISSAL

A. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). MCR 2.116(C)(7) entitles a defendant to summary disposition if the plaintiff's claims are barred because of "an agreement to arbitrate or to litigate in a different forum"

We review de novo questions of law, including the existence and enforceability of an arbitration agreement. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). We also review de novo whether a party waived its rights to arbitration. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). We review "for clear error the trial

court's factual determinations regarding the applicable circumstances.” *Id.* The trial court clearly errs when we are definitely and firmly convinced that it made a mistake. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

B. ANALYSIS

In Docket No. 328309, Phillips first contends that the existence of the contractual arbitration agreement did not bar her torts-based claims against DeShano. We disagree.

The economic loss doctrine provides that “[w]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses.” *Neibarger v Universal Coops, Inc.*, 439 Mich 512, 520; 486 NW2d 612 (1992) (citation and quotation marks omitted, brackets in *Neibarger*). This doctrine applies to consumer, as well as commercial, transactions. *Sherman v Sea Ray Boats*, 251 Mich App 41, 50-51, 53-54; 649 NW2d 783 (2002). A plaintiff may maintain a tort action only if the defendant owes the plaintiff a duty separate and distinct from the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004).

In this case, Phillips alleged that DeShano should have known about the defects in the structure, failed to properly represent the property when marking it, and violated its duty to disclose structural defects. The parties only had a legal relationship because DeShano contracted to sell Phillips the home. Phillips’s claims involved no duties that arose separately and independently from that relationship. We conclude that Phillips’s remedies lie solely with the parties’ contract, which provided that any disputes would be resolved by binding arbitration.

Phillips provides no support for her additional assertions that arbitration provisions are contrary to the public policy of this state or that the enforceability of the contract was tied to a dissolved condominium project, and we reject her assertions for failing to support them. See *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Second, Phillips contends that DeShano waived its arbitration provision by participating in Phillips’s case for 17 months. We again disagree.

Generally, courts disfavor the waiver of a contractual right to arbitration. *Madison Dist Pub Sch*, 247 Mich App at 588. However, a party may waive an arbitration agreement by conduct, with each case decided on the particular facts and circumstances of that case. *Id.* at 589. A party seeking to establish that another party has waived an arbitration clause must establish that the party seeking to enforce the clause has acted inconsistent with the right to arbitration, and that those acts prejudiced the opposing party. *Kauffman v Chicago Corp*, 187 Mich App 284, 292; 466 NW2d 726 (1991). Pursuit of discovery is inconsistent with a demand for arbitration. *Joba Constr Co v Monroe Co Drain Comm’r*, 150 Mich App 173, 178-179; 388 NW2d 251 (1986). A party may also waive arbitration by failing to state it as an affirmative defense, conducting discovery, exchanging witness and exhibit lists, filing motions to compel discovery, and participating in mediation and facilitation. See *Myers*, 247 Mich App at 596-597.

While Phillips contends that DeShano did assert the arbitration clause as a defense right away and delayed in bringing its summary disposition motion for 17 months, a failure to timely assert a right without more is a forfeiture, not a waiver. See *Quality Prods & Concepts Co v*

Nagel Precision, Inc., 469 Mich 362, 379; 666 NW2d 251 (2003). In the interim, DeShano did attend scheduling and settlement conferences and defended the depositions requested by other parties. However, DeShano did not conduct any independent discovery or file any motions other than its eventual motion for summary disposition. At the hearing on the motion, DeShano asserted that its presence at case evaluation and facilitation were attempts to settle the dispute. We are not definitely and firmly convinced that the trial court made a mistake when it found that DeShano did not engage in the litigation in a way inconsistent with its rights to arbitration. Accordingly, we conclude that the trial court properly determined that DeShano had not waived its right to arbitration, and it properly granted summary disposition under MCR 2.116(C)(7).

III. OFFER OF JUDGMENT SANCTIONS

A. STANDARDS OF REVIEW

“This Court reviews a trial court’s decision to award sanctions under MCR 2.405 for an abuse of discretion.” *J C Bldg Corp v Parkhurst Homes, Inc.*, 217 Mich App 421, 426; 552 NW2d 466 (1996). The trial court abuses its discretion when its decision falls outside the reasonable and principled range of outcomes. *Augustine*, 292 Mich App at 424. We review de novo the interpretation and application of our court rules. *Id.* at 423.

B. ANALYSIS

In Docket No. 329740, Phillips contends that the trial court improperly awarded Wolgast offer of judgment sanctions under MCR 2.405. We disagree.

When a party rejects an offer of judgment, “[i]f the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror’s actual costs incurred in the prosecution or defense of the action.” MCR 2.405(D)(1). The trial court may not award offer of judgment sanctions if the case has been submitted to case evaluation, unless the case evaluation award was not unanimous. MRE 2.405(E).

In this case, the case evaluation award was not unanimous. Therefore, MCR 2.405(E) does not preclude Wolgast from seeking offer of judgment sanctions. Phillips’s reliance on cases interpreting previous versions of MCR 2.405 is misplaced.

Phillips also contends that awarding Wolgast offer of judgment sanctions was not in the interest of justice because Wolgast engaged in gamesmanship when it offered only \$500 to settle the case but later paid \$3,800 that it admitted it had not earned. We agree with the trial court’s conclusion that offer of judgment sanctions were not against the interests of justice.

“MCR 2.405 can be, and sometimes is, abused by making a de minimis offer of judgment early in a case, not with intention to settle, but with the hopes of tacking attorney fees to costs in the event of success on trial.” *Sanders v Monical Machinery Co.*, 163 Mich App 689, 692; 415 NW2d 276 (1987). MCR 2.405(D)(3) provides that “[t]he court may, in the interest of justice, refuse to award an attorney fee under this rule.” The interests of justice exception does not apply absent unusual circumstances, but it may apply when the offer of judgment rule was used for gamesmanship rather than sincere efforts at negotiation. *Luidens v 63rd Dist Court*, 219 Mich App 24, 32-33, 35; 555 NW2d 709 (1996).

While Wolgast's initial, low offer of judgment may be viewed as insincere, Wolgast continued to engage in settlement negotiations throughout the case, while there is no evidence that Phillips was similarly engaged. Phillips could have, but did not, make a counter-offer to Wolgast's low offer of judgment. Phillips rejected the \$15,000 non-unanimous case evaluation award that Wolgast accepted. Phillips acknowledges on appeal that she rejected a \$25,000 offer from Wolgast at or immediately before the trial. And Phillips also sought \$1,000,000 in damages on a home worth \$200,000. The jury ultimately found that Wolgast had not acted wrongly. Given that the overriding purpose of the court rule was to encourage settlement and that Wolgast actively engaged while Phillips utterly failed to engage, we conclude that the trial court's decision to award offer of judgment sanctions was a reasonable and principled outcome.

We also reject Phillips's argument that Wolgast was not a "prevailing party." While a party must be a prevailing party for entitlement to costs under MCR 2.625, the language of MCR 2.405 contains no such requirement and Phillips provides no legal basis for imposing one.

Finally, Phillips contends that the trial court's attorney fee award was not reasonable. Phillips did not raise this argument before the trial court, and thus it is not preserved for appeal. See *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). This Court could review this issue for a plain error affecting Phillips's substantial rights. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). However, given the extremely cursory nature of Phillips's argument, her failure to raise the issue in her statement of questions presented, and her failure to present any evidence to support her position that the award of fees was unreasonable, we conclude that Phillips has abandoned this issue. See MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

We affirm. As the prevailing parties, DeShano and Wolgast may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher

EXHIBIT 11

STATE OF MICHIGAN
COURT OF APPEALS

MILTON MOTON and ANNETTE MOTON,
Individually and as Next Friend of ELIJAH
MOTON and ELISHA MOTON,

UNPUBLISHED
May 18, 2001

Plaintiffs-Appellees,

v

OAKWOOD HEALTHCARE, INC., d/b/a
OAKWOOD HEALTHCARE SYSTEMS,

No. 220823
Wayne Circuit Court
LC No. 98-814687-NO

Defendant-Appellant.

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court order granting plaintiffs' motion to strike defendant's supplemental witness list. We decide this appeal without oral argument pursuant to MCR 7.214(E). We affirm.

Plaintiff Milton Moton filed this action in May, 1998. Moton claimed that he suffered a closed head injury when he was struck by a television while recuperating from surgery at one of defendant's facilities. The circuit court entered an original scheduling order and later amended that order, on plaintiffs' motions. The court's amended scheduling order required an exchange of witness lists by March 15, 1999.

Defendant originally filed a lengthy witness list. Subsequently, defendant filed a supplemental witness list, seeking to name thirty-seven additional witnesses. The trial court granted plaintiffs' motion to strike the amended list, but allowed defendant to add one expert witness. The court denied rehearing and this Court granted defendant's application for leave to appeal.

A trial court's decision whether to allow a party to add a witness is discretionary. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). The objective of pretrial discovery is to make available to all parties in advance of trial all relevant facts that might be admitted into evidence. Further, the purpose of witness lists is to avoid trial by surprise. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). A party may move for modification of a scheduling order at any time. MCR 2.401(B)(2)(c)(iii). When the order

requires the filing of a witness list by a certain deadline, the trial court may order that any witness not listed is prohibited from testifying at trial except for good cause shown. MCR 2.401(I)(2).

Defendant has failed to show that the court abused its discretion in striking the supplemental witness list. There is no evidence in the record indicating a mutual agreement to postpone discovery. Further, defendant had a full opportunity to make its arguments before the trial court. Defendant filed a written response to the motion and was given sufficient time at oral argument to address all of the relevant factors. While plaintiffs' deposition was delayed, that does not explain defendant's failure to conduct timely discovery from plaintiffs' treating physicians and co-workers. Defendant failed to adequately explain its delay in obtaining the private investigators' material. The trial court's decision to limit their testimony to events that occurred after mediation is not unreasonable. The court did not abuse its discretion in granting the motion to strike.

Finally, defendant argues that the trial court should have accepted the supplemental witness list because defendant explicitly reserved the right to amend its original witness list. However, allowing parties to circumvent the rules by claiming a reservation of rights would defeat the purpose and authority of the court rules. The reservation is subject to the power of the trial court to control discovery.

Affirmed. We lift the stay of proceedings previously granted by this Court.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

EXHIBIT 12

2007 WL 2984188

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

GEORGE S. HOFMEISTER
FAMILY TRUST, et al, Plaintiffs,
v.

FGH INDUSTRIES, LLC, et al, Defendants.

No. 06-CV-13984-DT.

|
Oct. 12, 2007.

Attorneys and Law Firms

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Birmingham, MI, for Defendants.

AMENDED * ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL ARBITRATION

* The court enters this amended order to correct a clerical error that appeared in the last full paragraph on page 7 of the court's September 26, 2007 opinion and order. The sentence in that paragraph beginning with "Although the arbitration clause ..." is replaced herein by a sentence beginning with "Admittedly, the arbitration clause..." In substance and effect, the court's opinion and order is unchanged.

ROBERT H. CLELAND, United States District Judge.

*1 Pending before the court is "Defendants Fuhrman and Gruits' Motion to Compel Arbitration," which was filed on June 21, 2007. Plaintiffs' response was filed on July 3, 2007. In their motion, Defendants request an order requiring the parties to arbitrate Counts IV, VI and VIII of the Plaintiffs' complaint. The issue has been fully briefed by the parties and the court has held a hearing on the matter on September 5, 2007.¹ For the reasons stated

below, Defendants' motion will be granted in part and denied in part.

1 Case law in both the United States Supreme Court and the Court of Appeals for the Sixth Circuit establish that a hearing is required before a district court may enforce an arbitration agreement. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 451 (6th Cir.2005); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.").

I. BACKGROUND²

2 Much of the factual background is set forth in previous orders and is not central to the issue before the court.

Plaintiffs originally filed a complaint in state court on October 21, 2005. (Pls.' Mot. at 5; Pls.' Ex. 3.) Plaintiffs contend that they agreed to voluntarily dismiss the case and file it again elsewhere rather than litigate jurisdiction in state court, which might have entailed a lengthy appeal. (*Id.* at 7.) Plaintiffs filed their complaint in federal court on September 8, 2006, invoking the diversity jurisdiction of the court. (Compl. at ¶ 13.) The complaint alleges eleven counts against Defendants. (*Id.* at ¶¶ 70-132.)

On October 6, 2006, the court entered a consent order permitting an extension of time to answer the complaint or take other action until October 30, 2006. (10/6/06 Order.) Thereafter, the court entertained multiple motions, which resulted in the dismissal of several claims, dismissal of non-diverse defendants and entry of a preliminary injunction. (12/15/06 Order.) During the pendency of these motions (and other motions related to the preliminary injunction granted by this court), Defendants were not required to file an answer to the complaint.

Defendants filed their answer to the allegations in the complaint on January 16, 2007. In their answer, Defendants put forth eighteen affirmative defenses, none of which asserted a contractual right to submit the disputes to arbitration. (Answer at 26-28.) During the two months that followed, Defendants filed additional

motions, which resulted in an order dismissing several more of the Plaintiffs' claims. (4/12/07 Order.) Plaintiffs' "Motion for Summary Judgment Regarding Count VIII of Their Complaint" is still pending before the court.

The instant motion, filed on June 21, 2007, seeks an order compelling the parties to arbitrate Counts IV, VI and VIII of Plaintiffs' complaint "in accordance with the parties' agreement to arbitrate as set for [sic] in the Recapitalization Agreement." (Defs.' Mot. at 1.) Section 5.14 of the Recapitalization Agreement states that "[a]ny and all disputes, controversies or claims arising out of or related in any way to this Agreement or any of the Attendant Documents shall be resolved by way of arbitration, as provided in this Section 5.14; provided, however, that a party may seek a preliminary injunction or other provisional judicial relief." (Defs.' Mot. at 1; Agreement at 12, Defs.' Ex. A.)

II. STANDARD

The Federal Arbitration Act ("FAA") provides that arbitration clauses contained in commercial contracts are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." 9 U.S.C. § 2. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Cone Mem'l Hosp.*, 460 U.S. at 24; *see also Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392-93 (6th Cir.2003) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)). If a district court determines that a claim is within the scope of the arbitration clause in question, it is required to stay the proceedings "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. In order to compel the parties to arbitrate a claim, the district court must conduct a hearing, and:

*2 upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ... If the making of the arbitration agreement or the

failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4. "Under this statutory scheme, the district court must make four threshold determinations before compelling arbitration:

first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration."

Glazer, 394 F.3d at 451 (quoting *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir.2000)). If any doubts remain regarding the arbitrability of a claim, they must be resolved in favor of arbitration. *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir.2003) (citing *Fazio*, 340 F.3d at 392).

III. DISCUSSION

A. The Parties Agreed to Arbitration

Although Plaintiffs insist that Defendants have waived any right to demand arbitration, the court must first determine that such a right existed. *Stout*, 228 F.3d at 714 ("when asked by a party to compel arbitration under a contract, a federal court must determine whether the parties have agreed to arbitrate the dispute at issue"). If Defendants ever had a right to demand that Counts IV, VI and VIII of the Plaintiffs' complaint be arbitrated, that right arose by mutual agreement to be bound by the arbitration clause contained at Section 5.14 of the Recapitalization Agreement. If the court determines that the parties have agreed to arbitrate their disputes and the arbitration agreement is otherwise valid, then the court

must compel arbitration. *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir.2002).

The parties do not dispute that they voluntarily entered into the Recapitalization Agreement. (Defs.' Br. at 5.) Nor do they dispute that the arbitration clause was valid and enforceable at the time they bound themselves to the Recapitalization Agreement. Plaintiffs do not take issue with the validity of the arbitration agreement. In fact, in their brief Plaintiffs concede that Count VIII would be an arbitrable issue if not for Defendants' alleged waiver. (Pls.' Br. at 14.) At the time the parties entered into the Recapitalization Agreement, Defendants had a right to demand arbitration of "[a]ny and all disputes, controversies or claims arising out of or related in any way to [the Recapitalization Agreement] or any Attendant Documents." (Defs.' Mot. at 1; Agreement at 12, Defs.' Ex. A.) An earlier clause in the Recapitalization Agreement defines Attendant Documents as "all of the other agreements and documents contemplated by this [Recapitalization] Agreement" (*Id.*)

B. Counts IV, VI and VIII Are Within the Scope of the Arbitration Agreement

*3 Before the court may compel arbitration of Counts IV, VI and VIII, the court must conclude that the disputed issues are within the scope of the arbitration agreement. *Stout*, 228 F.3d at 714. As noted above, there is a general presumption in favor of arbitrability. *Highlands Wellmont*, 350 F.3d at 573. Furthermore, this presumption controls "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Glazer*, 394 F.3d at 450 (quoting *Highlands Wellmont*, 350 F.3d at 576-77). Where the arbitration clause in question is broadly constructed, "only an express provision excluding a specific dispute, or 'the most forceful evidence of a purpose to exclude the claim from arbitration,' will remove the dispute from consideration by the arbitrators." *Id.*

Because Plaintiffs have conceded that Count VIII is within the scope of the arbitration clause, the court must address only whether Counts IV and VI are arbitrable issues. "A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the

scope of the arbitration agreement." *Fazio*, 340 F.3d at 395.

Assuming *arguendo* that the relationship between Plaintiffs and Defendants are fiduciary in nature, Count IV claims that:

[Defendants] have violated and continue to violate their fiduciary duties to Trans and its shareholders by:

- a. Removing Mr. Hofmeister from the Board of Directors of Trans in order to gain control of Trans and convert the Converted Assets, and continuing to exclude Mr. Hofmeister and the Trusts from the governance of Trans, despite the fact that this exclusion is not in the best interest of Trans or its shareholder;
- b. Causing Trans to cease making distributions to the Trusts as required under the [Recapitalization Agreement], and to continue to breach the Agreement by failing to make required distributions;
- c. Taking compensation in the form of the Converted Fees from Trans in an amount that was and continues to be exorbitant and unreasonable in violation of MCL 450.1545(a)(4);
- d. Engaging in self-interested transactions that are not fair to Trans, carrying out these interested transactions in secret, and failing to disclose to and seek approval for these transactions from a disinterested party as required by law,
- e. Using Trans to pay for personal expenses, including travel, personal business opportunities and attorneys' fees, and
- f. Other breaches that may be discovered.

(Compl. at ¶ 91.) Defendants' contention is that by including within paragraph 91 allegations that Defendants violated their fiduciary duty to Plaintiffs by ceasing to make "distributions to the Trusts as required under the [Recapitalization Agreement]," the claim for breach of fiduciary duty is transformed into an arbitrable issue, rather than an independent claim that may be litigated. (Defs.' Br. at 5-6.) Plaintiffs, however, point out that Defendants' "argument ignores the fact that [Count IV] would exist without these allegations of their non-payment of distributions." (Pls.' Br. at 14.) Plaintiffs'

allegation in paragraph 91 “is just one fact of many other facts alleged that would prove that they have breached their fiduciary duties to Trans and its shareholders.” (*Id.*)

*4 While the court is persuaded that Plaintiffs' claim of breach of fiduciary duty could be maintained without reference to the Recapitalization Agreement, the inquiry does not end there. The scope of the arbitration agreement goes beyond the Recapitalization Agreement to all documents contemplated by that Agreement—the Attendant Documents. The remaining allegations in Count IV depend upon alleged breaches of fiduciary duties. Those duties, in turn, arise from the Attendant Documents, as Plaintiffs absent those documents would otherwise have no legal relationship with Defendants Fuhrman and Gruits that would give rise to claims of breach of fiduciary duty. Given the strong federal policy in favor of arbitration and the relatively broad scope of the parties arbitration clause, the court cannot conclude that Count IV is “likely outside the scope of the arbitration.” *Fazio*, 340 F.3d at 395. Admittedly, the arbitration clause is quite broad and there is no explicit provision excluding Count IV from the arbitration requirement. But because only *unrelated* allegations of wrongdoing by a fiduciary provide “the most forceful evidence of a purpose to exclude the claim from arbitration,” *Glazer*, 394 F.3d at 450, the court cannot conclude the same in this case, where the alleged wrongdoing clearly relates to the Attendant Documents contemplated by the Recapitalization Agreement and, specifically, the arbitration clause.

Count VI presents the same question. Plaintiffs claim in Count VI that:

[Defendants] have carried out their illegal and wrongful plan to oppress the Trusts by doing the following:

- a. causing FGH Industries (which is under the control of FGH Capital) to oppress the Trusts' minority interest in Trans as described in paragraph 89;
- b. causing Trans to cease making distributions to the Trusts as required under the [Recapitalization Agreement];
- c. [dismissed pursuant to 04/12/07 Order];
- d. failing to cause FGH Capital and FGH Industries to make distributions to the Trusts; and

e. other actions that may be discovered.

(Compl. at ¶ 103.) Defendants' argument is essentially identical to that made in favor of compelling arbitration of Count IV. Therefore, the court employs the same analysis and evaluates whether “an action could be maintained without reference to the contract or relationship at issue.” *Fazio*, 340 F.3d at 395.

Plaintiffs again argue that “Plaintiffs' allegation that [Defendants] failed to make distributions as required by the [Recapitalization Agreement] is just one fact of many other facts alleged that would prove that they have breached their fiduciary duties to Trans and its shareholders.” (Pls.' Br. at 14.) This argument is also not persuasive with respect to Count VI. Paragraphs 103(b) & (d), the two most substantive averments contained in paragraph 103, allege failure to make distributions to the Trusts as required by the Recapitalization Agreement. Paragraph 103(a) consists only of vague allegations incorporating paragraphs 1 through 88.³ The remaining averment, paragraph 103(e), contains only boilerplate language devoid of substance. As such, Count VI rises and falls with allegations of failure to make disbursements, which fall squarely within the purview of the Recapitalization Agreement, whatever the scope of the Attendant Documents. The court concludes that, absent paragraphs 103(b) and 103(d), Count VI would not sufficiently state a claim that would fall outside of the parties' agreement to arbitrate.

³ Paragraph 103(a) refers to paragraph 89 contained within Count IV of the complaint, which merely incorporates the allegations contained in paragraphs 1 through 88.

*5 Two additional considerations support this conclusion. Most importantly, as noted above, there is a strong presumption in favor of arbitration and any doubts as to the arbitrability of a claim must be resolved in favor of arbitration. *Highlands Wellmont*, 350 F.3d at 573. Even if the court were not convinced that, absent those allegations referring to the Recapitalization Agreement, the claim could not be maintained, the federal policy favoring arbitration would likely overcome the vague nature of the remaining allegations. Second, “any ambiguity in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration.” *Great Earth Cos., Inc.*, 288 F.3d at 889 (quoting *Stout*,

228 F.3d at 714) (emphasis added). Section 5.14 of the Recapitalization Agreement stipulates that “[t]he parties acknowledge that it is their intent to expedite the resolution of the dispute, controversy or claim in question, and that the Arbitrators shall schedule the timing of the hearing consistent with that intent.” (Agreement at 12, Defs.’ Ex. A.) This language makes it clear that the parties intended to expedite the resolution of disputes arising of or relating to the Recapitalization Agreement through arbitration. Plaintiffs’ efforts to litigate as many claims as possible in federal court is inconsistent with this intention.

C. Defendants Did Not Waive Their Right to Demand Arbitration

Plaintiffs make three arguments in support of their contention that Defendants have waived their right to demand arbitration: by (1) actively participating in the state court action and by taking actions inconsistent with demanding arbitration, (2) actively litigating after the federal court action had commenced and (3) failing to compel arbitration earlier. (Pls.’ Br. at 11-13.)

In order to adequately address Plaintiffs’ arguments, the court must first determine whether state or federal law provides the proper standard for reviewing an alleged waiver of an arbitration agreement within the coverage of the FAA. Section 5.3 of the Recapitalization Agreement states that, “[t]his agreement has been executed in, and shall be construed and enforced in accordance with the laws of, the State of Michigan without regard to the conflicts of law principles thereof.” (Defs.’ Ex. A at 10.) However, “even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue.” *Doctor’s Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir.1997) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995)). The issue here is whether the right to enforce the arbitration clause has been waived. Article 5.8 of the Agreement states the following:

No party shall be deemed to have waived compliance by any other party with any provision of this Agreement unless such waiver is in writing, and the failure of any

party at any time to enforce any of the provisions of this Agreement shall in no way be construed as a waiver of such provisions and shall not affect the rights of any party thereafter to enforce such provisions in accordance with their terms.

*6 (Agreement at 11, Defs.’ Ex. A.) The record is void of any written waiver of the arbitration agreement by Defendants. The court does not accept Plaintiffs’ argument, advanced at the hearing, that the filing of a suit in state court by Defendants constitutes a written waiver of the arbitration clause.

Further, in the context of this case, the court concludes that the FAA preempts state law regarding arbitration.⁴ *Southland Corp.*, 465 U.S. at 10-11. “[A]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon.” *Gen. Star Nat’l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir.2003) (quoting *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir.1973)). However, waiver of the right to arbitrate claims within the scope of an arbitration agreement is not to be lightly inferred. *Highlands Wellmont*, 350 F.3d at 573 (citing *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 355 (6th Cir.2003)). “A party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice.” *Gen. Star Nat’l Ins. Co.*, 289 F.3d at 438 (citing *Doctor’s Assocs., Inc.*, 107 F.3d at 131). Additionally, other courts have held that “[a] party may waive its right to insist on arbitration if the party ‘so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.’ ” *Microstrategy, Inc.*, 268 F.3d at 249 (quoting *Maxum Found., v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir.1985)). “[D]elay and the extent of the moving party’s trial-oriented activity are material factors in assessing a plea of prejudice.” *Id.* (citation omitted). However, any doubts regarding the arbitrability of a dispute should be resolved in favor of arbitration, even when assessing an allegation of waiver. *Cone Mem’l Hosp.*, 460 U.S. at 24-25. Therefore, with respect to all three of Plaintiffs’ arguments, the question to be answered is “whether the party objecting to arbitration has suffered actual prejudice.” *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir.2001) (quoting *Fraser v. Merrill Lynch*

Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir.1987)) (emphasis added).

⁴ Plaintiffs' reliance on *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), in support of their assertion that "Michigan law applies to determine if the [Defendants] have waived their right to seek arbitration," is misplaced. (Pls.' Br. at 10.) The *Dobson* Court's discussion is limited to the invalidation of arbitration clauses, not the waiver of admittedly valid arbitration clauses.

Plaintiffs' first argument would have this court take into consideration litigation activity that took place in a prior state court action. Plaintiffs argue that Defendants acted inconsistently with any right to arbitrate during the state court proceeding by filing a counter-claim, filing motions and serving discovery requests upon Plaintiffs. (Pls.' Br. at 11.) However, Plaintiffs acknowledge that Defendants did assert their right to arbitrate in both their answer to the complaint and their answer to the amended complaint. (Pls.' Br. at 5-6.) Furthermore, Plaintiffs do not draw the court's attention to any binding precedent that would compel this court to infer waiver from Defendants' participation in litigation activity in a prior proceeding that resulted in no judgment on the merits. Neither party identifies the nature of the motions entertained by the state court in that proceeding or the extent to which those issues were litigated before the parties voluntarily dismissed the suit. Nor do the parties provide the court with any indication of the attendant cost of such litigation activity. Additionally, the court finds it significant that the parties agreed in the Recapitalization Agreement that, should any dispute go to arbitration, the parties would be entitled to "reasonable levels of discovery."⁵ (Agreement at 12, Pls.' Ex. A.) It is likely that Defendants would have obtained the same information in an arbitration proceeding, thereby mitigating any claim of actual prejudice. See *Microstrategy, Inc.*, 268 F.3d at 251. In light of the strong federal policy in favor of enforcing arbitration agreements, the court finds that the litigation activity conducted in the state court action is insufficient to warrant an inference of waiver.

⁵ Section 5.14 of the Recapitalization Agreement provides that, "[i]n any such arbitration proceeding, the Arbitration Parties shall be entitled to reasonable levels of discovery in accordance with the Federal

Rules of Civil Procedure." (Agreement at 12, Pls.' Ex. A.)

*7 Plaintiffs also attempt, in part, to reargue whether the delay and litigation activity associated with the state court action resulted in waiver. Those arguments have already been addressed, and there is no need for the court to revisit them.

The thrust of Plaintiffs' remaining arguments is that delay and litigation activity conducted during this federal court action have resulted in actual prejudice to Plaintiffs. Plaintiffs argue that "[Defendants] ask for this relief after they have litigated in this Court for almost 10 months, filing and responding to pleadings and motions, participating in conferences with this Court, all without a mention of their alleged right to arbitrate." (Pls.' Br. at 12.) Additionally, Plaintiffs contend that, "[i]n the intervening time, the Plaintiffs have born [sic] the expense of litigating the ... Federal Court Action." (Pls.' Br. at 13.) These arguments are not persuasive.

Upon review of the docket, the court notes that this suit was filed in federal court on September 8, 2006 and the pending motion to compel was filed on June 21, 2007. During the intervening year, Defendants have filed six motions. Defendants' motions included:

1. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) for Lack of Subject Matter Jurisdiction [Dkt # 22];
2. Motion for Order Suspending/Staying December 15, 2007 Preliminary Injunction [Dkt # 37];
3. Defendants' Motion to Dismiss Counts I and II of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Dkt # 54];
4. Defendants' Motion to Dismiss Count VI of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Dkt # 55];
5. Defendants' Motion to Dismiss Count VII Complaint Pursuant to Fed.R.Civ.P. 56 and 12(b)(6) [Dkt # 56]; and
6. Defendants Fuhrman and Gruits' Motion to Compel Arbitration [Dkt # 91].

All but one of Defendants' motions seek to eliminate disputes between the parties either by dismissal at an early

stage of the proceeding or by resolution at the agreed-upon forum. Plaintiffs, on the other hand, chose to file in federal court despite Defendants' prior assertions that Plaintiffs' claims were barred by an agreement to arbitrate. (Pls.' Br. at 5-6.) Since initiating suit in federal court, Plaintiffs have filed no less than fifteen motions, many of which have been unrelated to the substance of the complaint, and have been resolved at an early stage in the proceedings. The vast majority of the motions filed by both sides do not relate to the counts potentially subject to arbitration. The Sixth Circuit has recognized that "waiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of the contract, but attempts to meet all issues raised in litigation between it and another party to the agreement." *Germany*, 477 F.2d at 547 (citing *Gen. Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir.1970)).

It appears that Defendants have attempted to minimize the number of counts that need to be litigated in this court or, alternatively, submitted to arbitration, through the use of pretrial motions. Only after these initial motions did Defendants file the instant motion to compel arbitration. Moreover, Defendants do not seek to compel arbitration of all counts, but only those they assert are arbitrable. At the very least, an equal part of the delay and expense involved in this case appears to be a result of the extent to which Plaintiffs have chosen to engage in motion practice. The court cannot hold Defendants responsible for the entirety of the delay and expense. Moreover, there is no evidence that the delay involved in Defendants' attempt to narrow the scope of the lawsuit has caused any actual prejudice to Plaintiffs. *Gen. Star Nat'l Ins. Co.*, 289 F.3d at 438 (citing *Doctor's Assocs., Inc.*, 107 F.3d at 131). In consideration of the strong preference in favor of arbitration and against waiver, the court cannot infer waiver based upon the parties' conduct at this stage of their dispute.

D. The Complaint Does Not Assert any Federal Statutory Claims

*8 The court agrees with Defendants that "Plaintiffs' complaint does not allege the violation of any Federal [sic] statutory claims." (Defs.' Br. at 4.) Therefore, the court need not consider whether Congress intended any of Plaintiffs' claims to be nonarbitrable. *Stout*, 228 F.3d at 714.

E. The Remaining Claims Should Not Be Stayed Pending Arbitration

The FAA mandates that, after conducting a hearing and "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. Therefore, the court is required to compel arbitration of Counts IV, VI and VIII, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

Because the court finds that the parties entered into a valid arbitration agreement, Counts IV, VI and VIII are within the scope of the agreement and Defendants did not waive their rights under the agreement, the parties will be directed to proceed to arbitration on these claims. The only question left for the court to address is whether to stay the remainder of the proceedings pending arbitration. *Stout*, 228 F.3d at 714. Defendants contend that because "the Recapitalization Agreement and the parties' performance there under [sic] is entwined in several of Plaintiffs' claims," it is appropriate for this court to stay the remaining proceedings pending resolution of Counts IV, VI and VIII. (Defs.' Br. at 6.)

The court is not inclined to agree. The factual and legal questions raised by the arbitrable Counts bear little relation to those arising out of the remaining⁶ state law claims. The remaining claims, as they appear to the court, are the following:

⁶ Prior motion practice has disposed of several Counts in Plaintiffs' complaint.

- (1) Aiding in the Concealment of Converted Property (Count II)
- (2) Breach of Fiduciary Duty to Trusts (Count V)
- (3) Unjust Enrichment (Count VII)
- (4) Breach of Contract for Failure to Pay Management Fees (Count IX)

(5) Civil Conspiracy (Count X)

(6) Injunctive Relief (Count XI)

Those claims may be resolved independently by this court without awaiting the results of arbitration. The arbitrable Counts concern, in the main, rights and duties pertaining to the management of Trans whereas the other Counts go beyond Trans to matters between the Plaintiffs and Defendants that do not directly implicate the operation of Trans.⁷ Further, even if all of Plaintiffs' claims involved similar factual and legal questions, "arbitration proceedings [would] not necessarily have a preclusive effect on subsequent federal-court proceedings." *Dean Witter Reynolds, Inc.*, 470 U.S. at 223. Furthermore, the court observes that the remaining claims are not so "entwined" as to have prompted Defendants to move this court to compel arbitration of those claims as well. Therefore, the court will compel arbitration of Counts IV, VI and VIII and proceed to resolve

the Plaintiffs' remaining claims without staying the proceedings in this court.

7

At the same time, to the extent that the remaining claims mention Trans or implicate its operation, they may proceed in this court even though such arrangement might mean "the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc.*, 470 U.S. at 217.

V. CONCLUSION

*9 IT IS ORDERED that "Defendants Fuhrman and Gruits' Motion to Compel Arbitration" [Dkt # 91] is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED as it pertains to Counts IV, VI and VIII of Plaintiffs' complaint and DENIED in its request for a stay of proceedings.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2984188

EXHIBIT 13

KeyCite Yellow Flag - Negative Treatment

Distinguished by *Reidy v. Cyberonics, Inc.*, S.D.Ohio, February 8, 2007

951 F.2d 348

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

DREXEL BURNHAM LAMBERT, INC.
and Chester Dudzik, Plaintiffs-Appellees,
v.

Paul MANCINO, Jr., Defendant-Appellant.

No. 91-3213.

|

Dec. 19, 1991.

On Appeal from the United States District Court for the Northern District of Ohio, No. 89-00822; Kreuzler, D.J.

N.D.Ohio

AFFIRMED.

Before MERRITT, Chief Judge, KENNEDY, Circuit Judge, and JAMES HARVEY, Senior District Judge. *

Opinion

PER CURIAM.

*1 Defendant-appellant Paul Mancino, Jr. appeals from a district court order granting summary judgment against him and compelling the parties to arbitrate their securities transaction disputes. For the reasons stated below, we AFFIRM the district court's decision.

I.

Plaintiff Drexel Burnham Lambert, Inc. ("Drexel") is a New York corporation in the securities industry. Defendant Mancino maintained a trading account with Drexel for approximately three years. Plaintiff Chester

Dudzik represented Drexel, and serviced Mancino's trading account with the firm. Before working for Drexel, Dudzik worked for Shearson Lehman Brothers, and handled Mancino's account there. At the time of Dudzik's move to Drexel, Mancino signed a transfer agreement authorizing the transfer of his account to Drexel.

The parties apparently did not sign a formal account agreement specifying the terms of Drexel's handling of Mancino's account. Rather, the parties acted on an *ad hoc* basis, with Dudzik performing various functions for Mancino, primarily advising and executing the purchase and sale of securities for the account. Each transaction was accompanied by a confirmation slip from Drexel/Dudzik to Mancino, identifying the particulars of the transaction, and specifying certain terms and conditions. The confirmation slip stated that the transaction being confirmed was subject to the terms and conditions printed on the back of the slip. Included in those terms and conditions was provision (6), which stated that the parties agreed that "all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, or on subsequent to the date hereof, shall be determined by arbitration."

II

We must first determine whether this court has jurisdiction to hear this appeal. Under the Federal Arbitration Act, only some orders pertaining to arbitration are immediately appealable. As a general matter, the Act distinguishes between interlocutory orders favoring arbitration, which are not appealable, and final orders favoring arbitration, which are. 9 U.S.C. § 16 (1990). Section 16(a)(3) specifically provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3) (1990). The issue then becomes whether the district court's grant of summary judgment was a "final decision."

In our view, it was. A final decision is one which " 'ends the litigation on the merits and leaves the court nothing to do but execute the judgment.' " *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir.1990) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Similarly, a final

order is one which “dismisses ‘an action in deference to arbitration’ and enters a final judgment.” *Id.*

Under these standards, the district court's grant of summary judgment and its order compelling arbitration are final, and therefore appealable under 9 U.S.C. § 16. Plaintiffs sued for a specific remedy—an order compelling arbitration under 9 U.S.C. § 4. The district court reached a final decision on the merits when it granted the remedy plaintiffs sought. Under section 16(a)(3) of the Arbitration Act, the order is immediately appealable.

III

*2 We review a grant of summary judgment *de novo*. *Storer Communications, Inc. v. National Ass'n of Broadcast Employees & Technicians*, 854 F.2d 144, 146 (6th Cir.1988). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). “There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When a party to an interstate contract invokes the Federal Arbitration Act to enforce a putative arbitration clause within that contract, a court's review is limited to two issues: (1) whether an express written agreement to arbitrate the subject matter of the present dispute exists between the parties, and (2) if so, whether the agreement to arbitrate has been breached. *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370, 373 (8th Cir.1983). In addressing each issue, the court must apply federal substantive law. *Id.* at 373 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983)). The court must be guided by the liberal federal policy favoring arbitration in contracts governed by the Federal Arbitration Act. *Id.* (citing *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24). Any doubts about the construction of the putative arbitration clause are to be resolved in favor of arbitration. *Id.*

Here, there is no dispute that Mancino refused to arbitrate the disagreement relating to the transactions between the parties. Thus, the only issue for this court is whether the

parties' agreement included a valid arbitration provision as a matter of law. We find that it did.

It is well settled that the terms of a written confirmation memorandum become part of a contract. “Where, as here, a [seller] has a well established custom of sending purchase order confirmations containing an arbitration clause, a buyer who has made numerous purchases over a period of time, receiving in each instance a standard confirmation form which it ... retained without objection is bound by the arbitration provision.” *Pervel Indus. v. T M Wallcovering, Inc.*, 871 F.2d 7, 8 (2d Cir.1989). This rule has consistently been enforced in the context of transactions between securities brokers/dealers and their customers. *See, e.g., Shirl v. Drexel Burnham Lambert*, No. 4-88-866, 1989 WL 90159, 1989 U.S. Dist. LEXIS 10434 (D.Minn. May 24, 1989) (question of valid signature on account agreement mandating arbitration of disputes need not be reached because parties' conduct which accorded with standard brokerage practices, including sending confirmation slips specifying terms, was sufficient to establish existence of agreement to arbitrate disputes).

Mancino has objected to the arbitration clause being considered part of his contract, without challenging the confirmation slips *in toto*. This analysis is incorrect, for a court need not examine whether there was a subjective agreement as to each and every clause in a contract, but rather whether through the course of dealings and the document as a whole the parties intended themselves to be bound. *Genesco Inc. v. T. Kaikuchi & Co.*, 815 F.2d 840, 845 (2d Cir.1987). Here, every transaction between the parties was accompanied by a confirmation slip conditioning the transaction upon acceptance of the “Terms and Conditions,” including the arbitration clause. As succinctly noted by the district court, “[Mancino] had ample opportunity to read the arbitration clause and have it stri[c]ken or refuse to do business with the plaintiffs. However, [Mancino] continued to do business with [Drexel/Dudzik] and, therefore, he is now bound by the arbitration clause.”

*3 Mancino contends that he had an oral agreement with Dudzik providing for no arbitration between them. He cites as evidence the absence of a customer account agreement containing an arbitration clause, which ordinarily would have been signed by a customer such as Mancino. This analysis falters. The written confirmation slips superseded any prior oral contractual

terms. The slips expressly provide that a condition of the transaction was that any controversy arising out of that “or any other agreement between [the parties], whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.” Mancino gives no reason why these terms are not controlling.

IV

Mancino has raised three final arguments, all without merit. First, he contends that Drexel/Dudzik waived their right to arbitration by reason of delay. A six-month interval between the filing of the state court proceeding and the Federal Arbitration Act filing does not constitute the type of actual prejudice necessary to support this claim. *See In re Mercury Constr. Corp.*, 656 F.2d 933 (4th Cir.1981), *aff’d on other grounds, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1982).

Second, Mancino contends that the availability of a parallel remedy in state court proceedings mandates abstention by the federal court under *Younger v. Harris*, 460 U.S. 37 (1971). This contention misapprehends the nature of *Younger* abstention doctrine. In this case, the federal statute under which relief was granted expressly contemplates the present situation—Mancino is therefore unable to elevate the state court proceedings

to the paramount importance and vitality necessary to implicate the *Younger* doctrine. *See Moses H. Cone Memorial Hosp.*, 460 U.S. 1 (1983). Further, Mancino’s concerns for judicial economy and conservation of judicial resources are not sufficient to overcome the federal courts’ “‘virtually unflagging obligation ... to exercise the jurisdiction given them.’” *Id.* at 15 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Mancino’s third contention is similarly without merit. The bankruptcy filing of one of the plaintiffs, Drexel, does not give occasion to invalidate an otherwise enforceable arbitration provision. Plaintiff Dudzik remains an interested party, and arbitration of claims against him should proceed in accordance with the order below.

The decision of the district court is therefore **AFFIRMED**.

* Honorable James Harvey, United States District Court for the Eastern District of Michigan, sitting by designation.

All Citations

951 F.2d 348 (Table), 1991 WL 270809

EXHIBIT 14

STATE OF MICHIGAN
COURT OF APPEALS

LINDA BOYNTON,

Plaintiff-Appellant,

v

MEDALLION HOMES LIMITED
PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED

April 24, 2003

No. 235939

Washtenaw Circuit Court

LC No. 99-011139-CP

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion to compel arbitration and denying plaintiff's motion for summary disposition. We affirm.

First, plaintiff argues the trial court erred in finding defendant was not required under the uniform mobile homes warranty act, MCL 125.991 *et seq.*, to warrant the mobile home it sold to her. We disagree.

Statutory interpretation presents a question of law that we review de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). In interpreting statutes, our primary goal is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The terms' fair and natural import should govern, *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998), and the Legislature is presumed to have intended the meaning it plainly expressed. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). If the plain and ordinary meaning of a statute's language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Toth v AutoAlliance Int'l (On Remand)*, 246 Mich App 732, 737; 635 NW2d 62 (2001). However, if reasonable minds can differ with respect to a statute's meaning, judicial construction is appropriate. *Adrian Sch Dist v Michigan Pub Sch Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998).

Section 3 of the mobile homes warranty act requires that new mobile homes sold by dealers in Michigan be covered by a warranty that "respectively appl[ies] to the manufacturer of the mobile home *and to the dealer* who sells the mobile home to the buyer in accordance with the terms of the warranty hereinafter specified." MCL 125.993 (emphasis added). Section 4

states the mobile home must “be covered by a *written warranty* from the *manufacturer or dealer*” and sets forth certain terms the warranty must contain, including terms that apply separately to the manufacturer and the dealer. MCL 125.994 (emphasis added).

Plaintiff asserts that the statute allows either the dealer or manufacturer to issue the written warranty, but the warranty must include the terms that apply to both. Meanwhile, defendant contends the provisions detailing the warranty’s terms merely indicate what warranties must be included depending on which party issues the warranty. We agree with defendant. The clear and unambiguous language of MCL 125.994 is that either the manufacturer *or* the dealer must provide a written warranty. It does not provide that both must. The subsections of § 4 then provide what must be contained in any manufacturer warranty and what must be contained in any dealer warranty. In the case at bar, the manufacturer issued a written warranty. Therefore, the statute does not require defendant to do so as well. In fact, defendant’s sales agreement specifically disclaims any warranties other than those imposed by law. Accordingly, the trial court correctly concluded that defendant did not provide a warranty and defendant could enforce the arbitration clause in the sales agreement.

Finally, plaintiff argues the trial court erred in finding defendant did not waive its right to arbitration where defendant failed to timely assert it as an affirmative defense and went forward with litigation, primarily by participating in judicial discovery. We disagree.

Whether the relevant circumstances establish a waiver of the right to arbitration constitutes a question of law, which we review de novo. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). However, we review for clear error the trial court’s factual determinations regarding the applicable circumstances. *Id.*

A party may waive its right to arbitration. *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995). However, waiver is disfavored, and the party asserting waiver has occurred “must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.” *Madison, supra* at 588; *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998), quoting *Burns, supra* at 582. Whether a party has waived its contractual right to arbitration must be decided on the individual facts of each case. *Madison, supra* at 589.

Waiver of arbitration can occur when a party files a responsive pleading without asserting the right to arbitration. *Hendrickson v Moghissi*, 158 Mich App 290, 299; 404 NW2d 728 (1987); *Joba Const Co, Inc v Monroe Co Drain Comm’r*, 150 Mich App 173, 179; 388 NW2d 251 (1986). Although defendant did not assert arbitration as an affirmative defense in its initial answer to plaintiff’s complaint, it later amended that answer to include it—notably, after plaintiff stipulated to entry of an order allowing the amendment. The amended answer related back to the date of defendant’s original answer. MCR 2.118(D). Therefore, defendant did not waive arbitration by failing to timely assert it as a defense.

Nonetheless, waiver may still occur even where a defendant properly pleaded arbitration as an affirmative defense. See *North West Michigan Constr Co v Stroud*, 185 Mich App 649, 651; 462 NW2d 804 (1990); *Campbell v St John Hosp*, 434 Mich 608, 617; 455 NW2d 695 (1990). For instance, “[p]ursuing discovery is regarded as being inconsistent with demanding arbitration, since discovery is not generally available in arbitration.” *Joba, supra* at 178-179.

Although defendant answered plaintiff's interrogatories and filed notice that it intended to take plaintiff's deposition, which it later withdrew without acting on, defendant did not waive arbitration. This Court has found waiver based only on far more extensive actions inconsistent with arbitration, such as in-depth discovery, filing of summary disposition motions, or participation in mediation. See, e.g., *Madison, supra* at 596-597; *Salesin, supra* at 356-357; *Joba, supra* at 179. Therefore, the trial court did not err in holding defendant did not waive its right to arbitration.

Affirmed. Defendant may tax costs.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell